

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VOITH INDUSTRIAL SERVICES, INC.,)

Petitioner,)

v.)

NATIONAL LABOR RELATIONS BOARD,)

Respondent.)

PETITION FOR REVIEW

Case No. **16-1211**

Voith Industrial Services, Inc. ("Petitioner"), hereby petitions for review of the Decision and Order of the National Labor Relations Board ("Board") in *Voith Industrial Services, Inc. and General Drivers, Warehousemen & Helpers, Local Union 89, affiliated with The International Brotherhood of Teamsters and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union 862, AFL-CIO and General Drivers, Warehousemen & Helpers, Local Union 89, affiliated with The International Brotherhood of Teamsters*, Case Nos. 09-CA-075496, 09-CA-078747, 09-CA-082437, 09-CB-075505, and 09-CB-082805, published at 363 NLRB No. 116, which was issued on February 17, 2016, and published on the National Labor Relations Board website, nlrb.gov.

The Board's February 17, 2016, Decision and Order is attached hereto.

WHEREFORE, Petitioner requests that the Court review the above-referenced Decision and Order, set it aside and grant Petitioner such other relief as is deemed just and equitable.

Dated February 19, 2016

Respectfully submitted,
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CERTIFICATE OF SERVICE

Gary A. Marsack, attorney for Petitioner, Voith Industrial Services, Inc., hereby certifies that he has caused a true and correct copy of the foregoing Petition for Review to be served upon the following representatives of the parties identified in this Petition for Review:

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Voith Industrial Services, Inc. and General Drivers, Warehousemen & Helpers, Local Union 89, affiliated with The International Brotherhood of Teamsters and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO

United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union 862, AFL-CIO and General Drivers, Warehousemen & Helpers, Local Union 89, affiliated with The International Brotherhood of Teamsters. Cases 09-CA-075496, 09-CA-078747, 09-CA-082437, 09-CB-075505, and 09-CB-082805

February 17, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On December 21, 2012, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. Respondent Voith filed exceptions and a supporting brief. The General Counsel filed an answering brief, and Respondent Voith filed a reply brief. The General Counsel and the Charging Party each filed limited cross-exceptions and supporting briefs. Respondent Voith filed an answering brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs² and has decided to affirm the judge's rulings, findings,³ and conclusions as

¹ No exceptions were filed to the judge's findings that Respondent UAW and its Local 862 (collectively, the UAW) violated Sec. 8(b)(1)(A) of the Act by accepting assistance and support from Respondent Voith in order to meet with employees and solicit membership applications and checkoff authorizations, and by prematurely accepting recognition from Respondent Voith. In addition, no exceptions were filed to the judge's dismissal of allegations that Respondent Voith (1) unlawfully told an employee at an orientation session on April 10, 2012, that new hires were represented by the UAW and would receive UAW insurance, and (2) unlawfully instructed employees in a staff meeting to report other employees' union activities.

² Respondent Voith has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

³ Respondent Voith has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362

modified,⁴ and to adopt the recommended Order as modified and set forth in full below.⁵

The judge found, and we agree, that Respondent Voith entered into an unlawful scheme enabling it to underbid other contractors seeking to provide vehicle staging, shuttle, and yard/inventory management services (vehicle processing work) for Ford Motor Company at Ford's Louisville Assembly Plant (the LAP). Those services had previously been performed by Auto Handling, Inc.,

(3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

⁴ We have amended the judge's conclusions of law consistent with our findings.

⁵ We shall modify the judge's recommended Order to conform to the Board's standard remedial language, correct inadvertent errors and omissions, and remedy the violations found. We shall further order Respondent Voith to file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and to compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards. We shall also delete the portion of the judge's recommended Order that permits Respondent Voith, under *Planned Building Services, Inc.*, 347 NLRB 670, 675-676 (2006), to limit its liability by showing in compliance that it would not have agreed to the monetary provisions of the predecessor's collective-bargaining agreement. Subsequent to the judge's decision, the Board overruled this portion of *Planned Building Services* in *Pressroom Cleaners*, 361 NLRB No. 57 (2014), motion for reconsideration denied 361 NLRB No. 133 (2014). In *Pressroom Cleaners*, the Board held that an "employer may no longer attempt to prove what the terms and conditions would have been if it had complied with its obligation to bargain." Slip op. at 6. We have modified the judge's recommended Order to accord with *Pressroom Cleaners*.

The judge recommended that a responsible management official be required to read aloud the notice to employees, and permit a representative of Teamsters Local 89 to be present at the reading. The judge, however, failed to include this provision in his recommended Order. We agree with the judge that this remedy is appropriate in light of the pervasiveness of the Respondent's unlawful scheme and the seriousness of the unfair labor practices. Accordingly, we shall modify the judge's recommended Order to include a notice-reading provision. We shall also substitute new notices in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014), and to conform to the Order as modified.

We shall also require Respondent Voith to post Respondent UAW's notice to employees. Although our colleague claims that ordering an employer to post a union's remedial notice only if the employer is "willing" is "[c]onsistent with the Board's standard practice," the Board's practice in consolidated CA and CB cases is not uniform. For example, in *Alliant Food Service, Inc.*, 335 NLRB 695, 698 (2001), the Board ordered the employer to post the union's notice and did not include "if willing" language in the employer's order. Consistent with *Alliant*, we believe that in cases such as this one, where the respondents schemed together in the commission of the unfair labor practices, and the employer committed the bulk of the unfair labor practices, it is appropriate to require that the employer post the union's notice along with its own. See also *Interstate Bakeries Corp.*, 357 NLRB 15, 20 (2011) (ordering respondent employer, which joined with respondent union in discriminating against an employee, to separately post its own and the union's notice as part of its own remedial obligations), *affd.* 488 Fed. Appx. 280 (10th Cir. 2012), *cert. denied* 133 S.Ct. 1458 (2013).

whose vehicle processing employees had been represented by Teamsters Local 89 (the Teamsters). In order to underbid Auto Handling, Respondent Voith informed Ford that the work force would be represented by the UAW and based its projected labor costs on the UAW tier 2 wage scale, which is far below that which Auto Handling had paid to its Teamsters-represented employees. Ford awarded Respondent Voith the vehicle processing contract. Respondent Voith then entered into a contract with Aerotek Inc., a labor staffing company, to assist in hiring permanent vehicle processing employees, and subcontracted to Aerotek the hiring of temporary employees to perform some of the vehicle processing work under the joint supervision of Voith and Aerotek.

To avoid incurring a successorship obligation that would require it to recognize and bargain with the Teamsters and pay the Teamsters wages and benefits, Respondent Voith engaged in an unlawful course of conduct designed to ensure that its employees would be represented by the UAW rather than the Teamsters. First, it limited its hiring of the Teamsters-represented former Auto Handling employees and other Teamsters-represented applicants, and it transferred inexperienced, UAW-represented janitorial employees to vehicle processing positions. It then unlawfully assisted the UAW in organizing that work force and unlawfully recognized the UAW as the representative of its vehicle processing employees based on the authorization cards that were obtained as a result of the unlawful assistance.⁶

We also agree with the judge's finding that but for Voith's unlawful intent and actions, it would have hired predecessor Auto Handling's Teamsters-represented work force, resulting in a successorship obligation to recognize and bargain with the Teamsters as the representative of the employees performing the vehicle processing work. The judge further determined, and we agree, that because of Voith's unlawful hiring scheme, Voith lost its entitlement to set initial terms and conditions of employment for the vehicle processing employees, and it was not entitled to make any unilateral changes in their terms and conditions of employment, includ-

ing unilaterally contracting out some of the unit work to Aerotek.

In sum, we agree with the judge's findings in all respects. Specifically, we adopt the judge's findings, for the reasons set forth in his decision as well as those discussed below, that Voith violated Section 8(a)(3) and (1) of the Act by implementing a plan to avoid hiring former employees of predecessor Auto Handling, Inc. or members of the Teamsters and by refusing to hire those individuals because they engaged in concerted activities or in order to avoid a successorship obligation to recognize and bargain with the Teamsters; Section 8(a)(5) and (1) by refusing, as a successor to Auto Handling, to recognize and bargain with the Teamsters as the representative of the unit employees; Section 8(a)(5) and (1) by unilaterally setting initial terms and conditions of employment for unit employees without first giving notice to and bargaining with the Teamsters about those changes; Section 8(a)(5) and (1) by unilaterally entering into the contract with Aerotek to hire individuals other than former Auto Handling employees to perform bargaining unit work without notifying and bargaining with Teamsters Local 89;⁷ Section 8(a)(2) and (1) by rendering assistance and

⁷ Our dissenting colleague disagrees with our finding that Voith was not entitled to unilaterally set the initial terms and conditions of employment for the unit employees. Although it is well settled that a successor employer is not bound by the substantive terms of the predecessor's collective-bargaining agreement and is ordinarily free to set initial terms and conditions of employment, *NLRB v. Burns Security Services*, 406 U.S. 272, 284 (1972), that right is forfeited where, as here, the successor unlawfully refuses to hire the predecessor's employees. See *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 1-2; *Advanced Stretchforming International, Inc.*, 323 NLRB 529, 530-531 (1997), *enfd.* in relevant part 233 F.3d 1176 (9th Cir. 2000), *cert. denied* 534 U.S. 948 (2001); *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 82 (1979), *enfd.* in relevant part sub nom. *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981). "In such cases, the successor must, as a matter of law, maintain the status quo by continuing the predecessor's terms and conditions of employment (as distinct from assuming an existing collective-bargaining agreement) until the parties have bargained to agreement or impasse." *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 1. As we stated in *Pressroom Cleaners*, the rationale for holding that the successor in such circumstances has forfeited his right to set initial terms was explained in *Love's Barbeque*. In *CNN America, Inc. and Team Video Services, LLC*, 361 NLRB No. 47, slip op. at 43-44 (2014), and again here, our dissenting colleague states his disagreement with the rule of *Love's Barbeque*. As we did in *CNN America*, and again in *Pressroom Cleaners*, we adhere to *Love's Barbeque*, which "has not been questioned by any Board or judicial decision" in the 35 years since it was decided. *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 2 fn. 5. Accordingly, we agree with the judge that in light of its unlawful hiring scheme, Voith forfeited its right to set unit employees' initial terms and conditions of employment.

Our dissenting colleague's argument that Voith's subcontracting of a portion of bargaining unit work to Aerotek did not violate Sec. 8(a)(5) fails for the same reason. The dissent argues that because there is no evidence that Voith had employed a substantial and representative complement of employees or had begun normal operations at the time

⁶ Voith's unlawful scheme began in October 2011, when Voith submitted its bid to Ford declaring that its "hourly employees will be UAW employees." In February 2012, while Voith ignored the numerous applications it received from skilled Teamsters-represented employees, it augmented its janitorial work force, and then unlawfully assisted the UAW in organizing and obtaining card signatures from janitors and began the process of transferring unskilled UAW-represented janitors to vehicle processing positions. On February 22, Voith unlawfully recognized the UAW. Voith's subcontracting of temporary unit work to Aerotek in March 2012 was also part of Voith's unlawful hiring scheme.

support to the UAW by allowing the UAW to meet with employees during orientation sessions and worktime in order to urge the employees to sign membership applications and checkoff authorizations; Section 8(a)(2) and (1) by granting recognition to the UAW when the UAW did not represent an uncoerced majority of the vehicle processing employees or at a time before the commencement of Voith's normal vehicle processing operations when it did not employ a representative segment of its ultimate vehicle processing employee complement; Sec-

of the Aerotek subcontract, it had no obligation to bargain over subcontracting this unit work. Voith did not assert this defense and we reject it in any event.

As stated above, the subcontracting to Aerotek was part of Voith's unlawful scheme to limit the hiring of Teamsters-represented employees in order to avoid an obligation to bargain with the Teamsters and to ensure that the UAW, and not the Teamsters, would be the employees' bargaining representative. The dissent cannot, and does not, dispute that the subcontracting of unit work to Aerotek involved a term and condition of employment pertaining to who would perform unit work. If Voith had "conducted itself as a lawful *Burns* successor," it would have been privileged to initially set this term of employment. *State Distributing Co.*, 282 NLRB 1048, 1049 (1987). As indicated above, however, it forfeited that right in conducting itself as an unlawful *Burns* successor by engaging in the discriminatory hiring scheme of refusing to hire almost all of the Teamsters-represented employees of predecessor employer Auto Handling. Thus, the "substantial and representative complement" defense that our colleague attempts to apply to the Aerotek subcontract fails because the work force to which he applies that defense was one that was unlawfully hired.

As we explained in *CNN America*, supra, where, as here, "an employer is found to have discriminated in hiring, the Board assumes that, but for the unlawful discrimination, the successor would have hired the predecessor employees in their unit positions," and further "assumes that the union would have retained its majority status" in that unit. Id., slip op. at 18. Accordingly, to allow the "substantial and representative complement" defense here would be contrary to this well-established principle and would confer on Voith a *Burns* right that it forfeited when it embarked on its unlawful hiring scheme.

The dissent contends that because the Aerotek subcontract is found to violate only Sec. 8(a)(5), and there is no complaint allegation that the subcontract was also unlawful under Sec. 8(a)(3), there is no basis for our finding that the subcontract was part of Voith's unlawful hiring scheme. The record refutes this contention. Par. 6 of the complaint alleges that Aerotek was an agent of Voith for purposes of hiring Voith's employees, and the judge so found. Thus, as Voith's agent in filling positions with non-Teamsters workers, Aerotek actively participated in the 8(a)(3) conduct by Voith to avoid hiring Teamsters-represented employees of predecessor employer Auto Handling. See, e.g., fn. 17, *infra*.

Contrary to our colleague, the positions that Aerotek assisted in filling pursuant to the 8(a)(3) hiring scheme were not limited to the 85 positions that he agrees were unlawfully denied to discriminatees. The hiring scheme also included contracting out some of the unit work to Aerotek. In these circumstances, there was no need to allege the subcontract as a separate 8(a)(3) violation. The fact remains that by engaging in its unlawful hiring scheme, which included the subcontracting to Aerotek, Voith did not conduct itself as a lawful *Burns* successor and therefore, as discussed above, it was not entitled to rely on the "substantial and representative complement" defense that our colleague seeks to apply to the 8(a)(5) subcontracting allegation.

tion 8(a)(1) by telling an applicant that if he was hired, he would have to become a member of the UAW; Section 8(a)(1) by informing an applicant that in order to be hired, he would have to refrain from engaging in Section 7 activity; and Section 8(a)(1) by denying the Teamsters access to its employees while granting access to the UAW.

For the reasons set forth below, we also find, contrary to the judge, that Respondent Voith violated Section 8(a)(1) by threatening to discharge employees if they did not wear safety vests bearing the UAW logo. In addition, we agree with the General Counsel and the Charging Party that the judge's decision should be clarified with respect to which employees are entitled to remedial relief in this case. We find, consistent with our reading of the judge's findings concerning unfair labor practices, that reinstatement and backpay remedies should be awarded to all 166 employees on Auto Handling's seniority list, not just the 85 employees listed in the complaint and attachment A of the judge's decision, as well as to any Teamsters Local 89-affiliated individuals who were not on the Auto Handling seniority list but who filed individual applications with Voith. We also grant the General Counsel's request that Voith be ordered to make whole any employees whose hiring was delayed on account of its discriminatory hiring scheme for any losses resulting from the delay in hiring them. We shall, however, deny the General Counsel's and the Charging Party's request that Voith be ordered to remit to the Teamsters dues that would have been deducted and remitted to it had Voith recognized the Teamsters as the employees' bargaining representative.

1. As stated above, we find that Voith unlawfully threatened to discharge employees if they did not wear Voith/UAW safety vests. On May 31, 2012, Voith Regional Manager Bret Griffin met with a number of full-time Voith employees and informed them that they would be required to wear new safety vests emblazoned with a Voith/UAW logo. Employee Brenda Helm objected, pointing out that she was a Teamsters member and preferred to wear her old safety vest. Griffin replied, "You will go home, if you do not wear the vest." All of the employees who attended the May 31 meeting ultimately accepted the proffered UAW safety vests and wore them for the remainder of the workday.

At a meeting the next day, Griffin informed the employees that they were no longer required to wear the Voith/UAW safety vests. Griffin then stated that he had been told by a representative of the NLRB that the Region intended to issue a complaint alleging that Voith had an obligation to recognize the Teamsters as the exclusive collective-bargaining representative of the vehi-

cle processing employees. Griffin told the employees that no one was going to tell him who would represent Voith employees, but that employees should call the NLRB if they had any questions. He told the employees that in his experience there had to be a secret-ballot election conducted by the Board to determine the bargaining representative, and that if anybody approached the employees about a union and they felt uncomfortable, please let him know. After the meeting, the employees who were Teamsters members removed their Voith/UAW safety vests and no longer wore them.

The judge found, and we agree, that Griffin's statement to Helm was inherently coercive, and that because the UAW was not the duly constituted exclusive collective-bargaining representative, requiring employees to wear safety vests with the Voith/UAW logo would violate the Act.⁸ Nevertheless, the judge dismissed the allegation, finding that Voith effectively repudiated the violation under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). The judge found that Griffin cured the violation by countermanding the vest-wearing requirement within 24 hours. The judge noted that Helm was not disciplined nor sent home on May 31, and that former Auto Handling employees and Teamsters members continue to wear Teamsters T-shirts while at work without retaliation by Voith.

The General Counsel and the Charging Party except to the judge's dismissal, arguing that the *Passavant* requirements were not satisfied. We agree. Under *Passavant*, repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. Here, although the attempted repudiation was timely and specific in nature to the coercive conduct, it was not unambiguous. Voith did not admit any wrongdoing, nor did Voith make clear that employees have the right to refrain from engaging in union activity. See *Holdings Acquisition Co. L.P. d/b/a Rivers Casino*, 356 NLRB 1151, 1152-1153 (2011) (employer did not effectively repudiate its misconduct because it "did not admit any wrongdoing" and failed to assure employees that it "would not interfere with employee rights in the future"). Further, the attempted repudiation on June 1 was clearly not free from other proscribed conduct. During the meeting at which the attempted repudiation occurred, Griffin informed the em-

ployees that he had been told by the NLRB that the Region intended to issue a complaint alleging that Voith had an obligation to recognize the Teamsters as the exclusive collective-bargaining representative of the vehicle processing employees, but that no one was going to tell him who would represent Voith employees. In addition, later that day, Griffin unlawfully denied Teamsters Local 89's request for access to employees. In these circumstances, we cannot find that the repudiation of the vest requirement occurred in an atmosphere free from proscribed conduct. Accordingly, we reverse the judge's dismissal of this complaint allegation and find that Voith violated Section 8(a)(1) by threatening to discharge employees if they did not wear a safety vest bearing a UAW logo.

2. We also agree with the judge that Voith unlawfully recognized the UAW as the representative of the vehicle processing employees. The judge found, and we agree, that the February 22 recognition was based on authorization cards that were tainted by Voith's unlawful assistance and the UAW's coercive methods in obtaining them, and recognition was premature because, as of that date, the employees were not yet performing vehicle processing work and Voith had not yet hired a representative complement of vehicle processing employees. We agree with the judge that there is no merit in Voith's claims that it was required to recognize the UAW on February 22, 2012, under various theories relating to accretion and after-acquired clauses.

We also agree with the judge that Voith was not required to recognize the UAW under the Board's *Gitano* "relocation of work doctrine."⁹ Voith asserts that, by using janitorial employees from a preexisting UAW-represented unit to fill the initial vehicle processing positions, Voith transferred a portion of the janitorial unit to a new facility, and the transferred janitorial employees then constituted the majority of the employees who were to perform vehicle processing work. In response, the General Counsel asserts that the janitorial employees were not actually transferred to vehicle processing positions as of February 22 and, in any event, that the trans-

⁸ Citing *Lee v. NLRB*, 393 F.3d 491 (4th Cir. 2005), our colleague finds that this threat would have been unlawful even if the UAW had been the representative of Voith's employees at the time the threat was made. We find it unnecessary to decide that issue. We are not, as our dissenting colleague suggests, implying that Voith would not have violated the Act had the UAW been the employees' duly constituted collective-bargaining representative. As stated above, we are not passing on that issue.

⁹ *Gitano Group, Inc. and U.S. Outerwear, Single and Joint Employers, d/b/a Gitano Distribution Center*, 308 NLRB 1172, 1175 (1992). Under *Gitano*, when an employer transfers a portion of its unit employees from one location to a new location, there is a rebuttable presumption that the unit at the new facility constitutes a separate appropriate unit. If this presumption is not rebutted, the Board applies a "simple fact-based majority test" to determine whether the employer is obligated to recognize and bargain with the union as the representative of the unit at the new facility. If a majority of the employees in the unit at the new facility are transferees from the original bargaining unit, the Board will presume that those employees continue to support the union and will find that the employer is obligated to recognize and bargain with the union as the representative of the employees in the new unit.

fers were part of its unlawful scheme to avoid hiring the predecessor's employees, and that there was no new facility and no relocation of janitorial work. Although Voith hired employees as janitors and then eventually transferred them into vehicle processing positions, no work was relocated from the janitorial operation inside the LAP to the vehicle processing operation in the yard. For all these reasons, *Gitano* is inapplicable here, and we adopt the judge's finding that Voith's recognition of the UAW was invalid and violated Section 8(a)(2) and (1) of the Act.

3. Relying on *Anthony's Painting, LLC*, 357 NLRB No. 62 (2011) (not reported in Board volumes), the General Counsel and the Charging Party except to the judge's failure to order Voith to reimburse the Teamsters for dues that would have been withheld and remitted had Voith recognized the Teamsters as bargaining representative, as it was legally required to do. Respondent Voith argues that a dues reimbursement remedy is not appropriate here. It maintains that a successor employer is not obligated to adopt or be bound by the predecessor's collective-bargaining agreement, and that absent a collective-bargaining agreement, an employer may not remit money to a union in the form of employee union dues. For the following reasons, we find that the requested dues reimbursement remedy is not appropriate in this case.

Anthony's Painting, supra, relied on by the General Counsel and the Charging Party as their sole support for the requested dues reimbursement remedy, was not a successorship case. In that default judgment case, the complaint alleged that the employer violated Section 8(a)(5) and (1) by withdrawing recognition from the union and repudiating an 8(f) collective-bargaining agreement during the term of the agreement. The complaint specified that the repudiation included, inter alia, the failure to deduct and/or remit union dues pursuant to employee checkoff authorizations. The Board's Order included a provision requiring the employer to deduct and remit to the union any dues that should have been, but were not, deducted from employee paychecks pursuant to valid dues-checkoff authorizations.

Unlike in *Anthony's Painting*, the complaint in this case did not allege the failure to withhold and remit dues to the Teamsters as a separate 8(a)(5) violation. Moreover, the General Counsel and the Charging Party have not cited any successorship-avoidance cases in which a dues reimbursement remedy has been included as part of the status quo ante remedy for the unlawful setting of

initial terms and conditions of employment.¹⁰ Accordingly, we decline to include lost Teamsters dues as part of the status quo remedy for Voith's unlawful unilateral changes.

4. The remaining issues concern the scope of the 8(a)(3) findings and related remedies. It is clear from the judge's decision that his refusal-to-hire findings and recommended reinstatement and backpay remedies apply to the former Auto Handling employees who filed employment applications with Voith. Those 85 individuals are listed on attachment A of the judge's decision. The General Counsel and the Charging Party except to the judge's failure to clearly find refusals to hire and provide reinstatement and backpay remedies for two additional categories of discriminatees: (1) the remaining 81 applicants on the Auto Handling seniority list, who did not file separate applications with Voith, and (2) 101 additional Teamsters-affiliated applicants who had not previously been employed by Auto Handling. Although it appears that the judge intended to find violations and provide remedies for all of those individuals, we agree with the General Counsel and the Teamsters that the judge's decision needs clarification.¹¹ For the following reasons, we find that the two additional categories of employees are properly encompassed in the 8(a)(3) findings and entitled to reinstatement and backpay.

¹⁰ Auto Handling's collective-bargaining agreement with the Teamsters, the National Master Automobile Transporters Agreement, Central and Southern Area Supplemental Agreements and Local Rider (NMATA), expired by its terms in 2011, before Voith took over the LAP vehicle processing work. Under *Bethlehem Steel Co. (Shipbuilding Division)*, 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964), any dues-checkoff obligation under that collective-bargaining agreement also would have expired in 2011, before Voith incurred its successorship obligation. Although *Bethlehem Steel* was subsequently overruled in *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015), that decision was applied prospectively only and is not applicable to this case. *Id.*, slip op. at 9.

¹¹ In his decision, the judge was inconsistent in how he referred to the discriminatees and those individuals covered by the remedial provisions of his recommended Order. For example, at various points in his decision, recommended Order, and notice, the judge referred to the discriminatees as "the former Auto Handling employees who were members of the Charging Party"; "the former Auto Handling employees"; "applicants who were former employees of Auto Handling or members of the Teamsters"; "the individuals listed in Attachment A"; "numerous Teamster affiliated employees [who] submitted applications to Voith" but were "not former Auto Handling employees"; "the employees set forth in Attachment A, and other similarly situated employees"; "applicants, including former employees of the predecessor employer, Auto Handling, Inc."; "the employees of the predecessor Auto Handling, Inc., named on Attachment A"; and "other applicants whose applications were submitted to us by the Teamsters for vehicle processing work."

*A. Teamsters Local 89-Affiliated Applicants
Not on Auto Handling Seniority List*

We agree with the General Counsel and the Charging Party that the Board should grant a remedy to those Teamsters Local 89-affiliated applicants who filed applications with Voith but were not on Auto Handling seniority list. Paragraph 9(a) of the complaint alleges that Voith unlawfully “established a hiring procedure and engaged in other conduct designed to exclude and/or limit the hiring of applicants who were former employees of Cooper Transport [Auto Handling’s parent company] or members of Teamsters Local 89.” (Emphasis added.) Thus, paragraph 9(a) covers any Teamsters Local 89-affiliated applicant, as well as any applicant who was employed by the predecessor, Auto Handling.¹²

The judge found that “while not former Auto Handling employees, numerous Teamster affiliated employees submitted applications to Voith but were not hired or considered for hire.” He further found that those employees “should have been considered” for the approximately 300 permanent and temporary vehicle processing positions available during the April 2012 startup period and subsequent months. It also appears that the judge was contemplating instatement and make-whole remedies for those additional Teamsters Local 89-affiliated applicants because in his recommended notice to employees, after providing a remedy for the former Auto Handling employees, he included a provision requiring that Voith “offer, in writing, immediate and full employment to the other applicants whose applications were submitted to us by the Teamsters for vehicle processing work . . . and make them whole for any loss of

¹² Our dissenting colleague argues that the phrase “or members of Teamsters Local 89” is “most naturally” read as an alternative description of the “former employees” of Auto Handling. The complaint is not a model of clarity, but we find it reasonable to read it to encompass Teamsters Local 89-affiliated applicants, particularly in light of the General Counsel’s opening statement, which began with the statement that “this trial is about Respondent Voith’s actions in seeking to avoid a bargaining obligation with Teamsters 89, and to establish a bargaining relationship with its preferred union, the UAW.” Our colleague believes that this statement does not reasonably convey that the General Counsel was alleging discrimination against Teamsters-affiliated applicants who had never worked for the predecessor. This statement, however, is not limited to a bargaining obligation arising from successorship, but is reasonably read to encompass discrimination against Teamsters-affiliated applicants who could be expected to support the Teamsters and enable Teamsters Local 89 to achieve majority status even if Voith were not a successor to Auto Handling. We disagree with our colleague’s view that this reading is foreclosed by the General Counsel’s failure to respond when the judge suggested, when ruling on the General Counsel’s motion to add Patsy Bowman-Miles as an alleged discriminatee, that her status as a discriminatee was dependent on the General Counsel’s showing that she had been employed by Auto Handling.

earnings they may have suffered by reason of our unlawful failure to hire them.” (Emphasis added.)

In support of its argument that the Teamsters Local 89-affiliated applicants who were not previously employed by predecessor Auto Handling should not receive a remedy, Voith asserts that the class of discriminatees in the complaint is “narrowly drawn” and is “limited to former AHI employees only who filed an employment application with Voith.” (Voith Ans. Br. 10.) However, as explained above, the complaint is not so limited. In our view, the complaint allegations are broad enough to include those Teamsters Local 89-affiliated applicants who were not on Auto Handling’s seniority list among those who were discriminated against by Voith and should be included in the remedy.

Moreover, the General Counsel argues, and we agree, that because the record contains the applications of the Teamsters Local 89-affiliated applicants, Voith was fully apprised that they were among the class of potential discriminatees.¹³ We agree with the General Counsel that this issue was fully and fairly litigated and that the General Counsel met his burden of showing that those employees were unlawfully discriminated against because of their Teamsters affiliation.¹⁴ Accordingly, we shall include the Teamsters Local 89-affiliated applicants

¹³ Our dissenting colleague argues that the fact that the applications of the Teamsters Local 89-affiliated applicants were entered as exhibits at the hearing did not reasonably inform Voith that those applicants were at issue. Our colleague suggests that because there could be other reasons for placing such applications in the record, they could not have provided Voith with notice that those applicants were at issue. We find otherwise. Par. 9(a) of the complaint refers in the disjunctive to applicants who were members of Teamsters Local 89, and the General Counsel’s opening statement clarifies the theory of the case: that the motivation for Voith’s unlawful hiring scheme and course of conduct was to ensure that the employees would be represented by the UAW and not the Teamsters. In this context, the placement of applications by Teamsters Local 89-affiliated employees into the record was sufficient to provide notice to Voith that the discriminatory failure to hire or consider those applicants was at issue.

¹⁴ Although *Planned Building Services, Inc.*, 347 NLRB 70 (2006), established that *Wright Line* is the appropriate framework for analyzing the discrimination against the former Auto Handling employees, *FES, a Division of Thermo Power*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002), is the appropriate framework for analyzing the discrimination against the approximately 101 Teamsters-affiliated applicants who were not employees of Auto Handling. Applying *FES*, we find that there are sufficient positions for these discriminatees when the entire vehicle processing work force is considered. By May 23, 2012, the combined Voith and Aerotek work force reached 272 employees and increased thereafter. We further find that the Teamsters Local 89-affiliated applicants were qualified for the positions. Because Voith hired employees for vehicle processing yard positions without any prior experience in performing the work, it is clear that no specialized qualifications or experience were required. Accordingly, we find that the General Counsel has met his *FES* burden to show a discriminatory refusal to hire the Teamsters Local 89-affiliated applicants.

who were not previously employed by Auto Handling among those receiving instatement and make-whole remedies for Voith's unfair labor practices.¹⁵

B. Employees on the Auto Handling Seniority List who did Not File Individual Applications

Paragraph 9(b) of the complaint alleges that Respondent Voith unlawfully "failed and refused to hire or consider for hire the former employees of Cooper Transport [Auto Handling's parent company] listed on exhibit A [of the complaint] . . . and others similarly situated." In our view, all of the employees on the Auto Handling seniority list, even those former Auto Handling employees who did not file individual applications with Voith, are "similarly situated" within the meaning of the complaint.

The vehicle processing work at the LAP was previously performed by the employees on the Auto Handling seniority list, and those employees were covered by the NMATA. Historically, when a new contractor took over the vehicle processing work at the LAP, that new contractor acquired the predecessor contractor's seniority list. Teamsters Local 89 President Fred Zuckerman explained that the NMATA seniority provisions (art. 5, sec. 5) require a successor contractor to utilize the predecessor's seniority list and that when a new contractor takes over, "You don't have to fill out applications. They have to take you by virtue of the provisions that are contained in the Collective Bargaining Agreement." (Tr. 830.) Zuckerman further testified that successor contractors must "offer employment to everybody that was on [the predecessor employer's seniority] list." (Tr. 836.) Based in part on that evidence, we find that the employees on the Auto Handling seniority list reasonably expected to retain their positions on the seniority list no matter which entity received the vehicle processing contract, even without filing individual applications with the new contractor. In these circumstances, we conclude that all of

the employees on the Auto Handling seniority list are "similarly situated" to the former Auto Handling employees listed in the complaint who filed applications with Voith.

We also find that Voith was fully apprised that these employees were in the class of potential discriminatees because the record contains the full Auto Handling seniority list, which was attached to the Teamsters' February 14, 2012 letter to Voith requesting that each of those employees be notified about any opportunities for employment with Voith. Thus, Voith was clearly on notice that Teamsters Local 89 was seeking employment for all of the former Auto Handling employees and that the allegations concerning an unlawful plan to discriminate in hiring to avoid successorship obligations involved the entire predecessor work force.

Voith argues that expanding the class of discriminatees to those who did not file applications would necessitate a finding that Voith made known to prospective applicants that it would be futile to apply. *Kessel Food Markets*, 287 NLRB 426, 431 (1987), *enfd.* 868 F.2d 881 (6th Cir. 1989), *cert. denied* 493 U.S. 820 (1989); *State Distributing Co.*, 282 NLRB 1048 (1987). Pointing out that numerous Teamsters members filed applications and some were hired, Voith asserts that here there is no "smoking gun" and "no evidence in the subject case which would have demonstrated that filing an employment application with Voith was an act in futility."¹⁶

Contrary to Voith's contention and that of our dissenting colleague, we find that Voith's course of conduct engendered a "climate of futility" sufficient to excuse the failure of some of the former Auto Handling employees to submit applications to Voith. *State Distributing Co.*, *supra*, 282 NLRB at 1048. As early as October 2011, Voith determined that the vehicle processing employees would be represented by the UAW, and it was evident that Voith would not generally be hiring former Teamsters-represented Auto Handling employees to perform vehicle processing work. Voith was repeatedly informed that the skilled and experienced employees on the Auto Handling seniority list were available to fill the positions, but Voith never contacted Auto Handling or Teamsters officials about hiring the experienced Auto Handling work force, and did not solicit applications from employees on the Auto Handling seniority list. It was clear when Voith ignored Zuckerman's February 14, 2012 letter, as well as the many applications submitted by former Auto Handling employees, that all of the individuals on Auto Handling's seniority list were being discriminated against as a class. Instead of contacting and

¹⁵ Our colleague contends that the Board cannot require instatement and backpay for applicants not previously employed by Auto Handling because Voith's unlawful conduct could not plausibly have contributed to their lack of employment. He asserts that the record fails to establish general antiunion hostility as a motivating factor in Voith's hiring decisions regarding those applicants. We disagree. Voith's entire course of conduct was designed so that the UAW, and not the Teamsters, would be the bargaining representative of the unit employees. Discriminating against Teamsters-affiliated applicants was part of that scheme. Even if the General Counsel's main theory of the case involved discrimination against predecessor employees to avoid an immediate successorship obligation, that did not preclude the General Counsel from also alleging broader discrimination against Teamsters-affiliated employees, in order to avoid any future bargaining obligations and to ensure that the employees would be represented by the UAW and not the Teamsters. As discussed above, we find that the complaint encompasses such a theory.

¹⁶ Voith Ans. Br. 8.

hiring experienced employees on the Auto Handling seniority list, Voith decided to transfer inexperienced UAW janitorial employees to perform vehicle processing work. At the same time, applications from former Auto Handling employees were in fact being disregarded as a class.¹⁷ Although many former Auto Handling employees did file applications despite Voith's unlawful conduct, and a few were hired, this is insufficient in our view to dispel the "climate of futility" engendered by Voith's conduct as a whole, including its premature and unlawful grant of recognition to the UAW on February 22, 2012. In light of this "climate of futility," as well as the former Auto Handling employees' reasonable expectation that they would retain their positions on the Auto Handling seniority list without filing individual applications with Voith, we find, contrary to our dissenting colleague, that the former Auto Handling employees on the Auto Handling seniority list who did not file individual applications with Voith are within the class of discriminatees entitled to a remedy for the violations committed by Voith,¹⁸ along with those former Auto Handling employees listed in Attachment A of the judge's decision who did file individual applications.¹⁹

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 4.

"4. Respondent Voith engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by telling an applicant that if he was hired, he would have to become a member of the UAW; informing an applicant

that in order to be hired, he would have to refrain from engaging in Section 7 activity such as striking; threatening to discharge employees if they did not wear a safety vest bearing the UAW logo; and denying Teamsters Local 89 access to its employees while granting access to the UAW."

2. Substitute the following for Conclusion of Law 5.

"5. Respondent Voith engaged in unfair labor practices within the meaning of Section 8(a)(2) and (1) of the Act by rendering assistance and support to the UAW by allowing the UAW to meet with employees during orientation sessions and worktime in order to urge the employees to sign membership applications and checkoff authorizations; and assisting, recognizing, and bargaining with the UAW as the collective-bargaining representative of the employees who are employed at the Ford Motor Company, Louisville, Kentucky assembly plant performing vehicle processing including staging, shuttle and yard/inventory, and batch and hold work, when the UAW did not represent an uncoerced majority of the unit employees or at a time before the commencement of Voith's normal vehicle processing operations when it did not employ a representative segment of its ultimate vehicle processing employee complement."

3. Substitute the following for Conclusion of Law 6.

"6. Respondent Voith engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act by implementing a plan to avoid hiring former employees of predecessor Auto Handling, Inc. or members of the Teamsters, and discriminating against or refusing to hire those individuals because of their concerted activities or Teamsters affiliation, or in order to avoid a successorship obligation to recognize and bargain with the Teamsters."

4. Substitute the following for Conclusion of Law 7.

"7. Respondent Voith engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by refusing, as a successor to Auto Handling, Inc., to recognize and bargain with the Teamsters as the representative of the employees at the Ford Motor Company, Louisville, Kentucky assembly plant performing vehicle processing including vehicle staging, shuttle and yard/inventory, and batch and hold work, concerning their terms and conditions of employment; unilaterally setting initial terms and conditions of employment for unit employees without first giving notice to and bargaining with the Teamsters about those changes; and unilaterally entering into a contract with Aerotek, Inc. to hire individuals other than former Auto Handling employees to perform bargaining unit work without notifying and bargaining with Teamsters."

5. Add the following as Conclusion of Law 9.

¹⁷ On March 6, 2012, Sarah Curry Martinez, an account manager at Aerotek, Inc. who was acting as Voith's agent for hiring purposes, sent an email to Voith's people services manager, Timothy Bauer, notifying him that they were "not considering" the "well over 100 people" who applied from the Auto Handling job. GC Exh. 102. In addition, in April 2012, when seeking applications for the temporary batch and hold positions, instead of seriously considering the numerous applications from employees on the Auto Handling list that it had on hand, Martinez sought applications at a job fair and told a former Auto Handling applicant that he would be hired only if he promised to refrain from striking. Martinez also stated that she would hire "all of you" if she did not fear that Teamsters employees would engage in strike activity.

¹⁸ Our dissenting colleague argues that providing a remedy for nonapplicants is punitive. As noted above, however, the Board has found it appropriate to grant remedies to nonapplicants where, as here, an employer's course of conduct engenders a "climate of futility" sufficient to excuse the failure of a predecessor's employees to submit applications to the successor. *State Distributing Co.*, supra, 282 NLRB 1048.

¹⁹ As noted above, Voith hired a small number of Teamsters-affiliated or former Auto Handling employees. The General Counsel requests that to the extent that those employees were "belatedly hired," they should be made whole for any losses resulting from that delay. We shall modify the recommended Order accordingly. Although the record before us does not indicate whether any such losses were incurred, the General Counsel may raise and litigate those issues at the compliance stage.

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"9. By the foregoing conduct, Respondent Voith has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act."

ORDER

A. The National Labor Relations Board orders that the Respondent, Voith Industrial Services, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing a plan to avoid hiring former employees of predecessor Auto Handling, Inc. or members of the Teamsters, and discriminating against or refusing to hire those individuals because of their concerted activities or Teamsters affiliation, or in order to avoid a successorship obligation to recognize and bargain with the Teamsters.

(b) Refusing, as a successor to Auto Handling, Inc., to recognize and bargain with the Teamsters as the representative of the employees at the Ford Motor Company, Louisville, Kentucky assembly plant performing vehicle processing including vehicle staging, shuttle and yard/inventory, and batch and hold work, concerning their terms and conditions of employment.

(c) Unilaterally setting initial terms and conditions of employment for unit employees without first giving notice to and bargaining with the Teamsters about those changes.

(d) Unilaterally entering into a contract with Aerotek, Inc. to hire individuals other than former Auto Handling employees to perform bargaining unit work without notifying and bargaining with Teamsters.

(e) Rendering assistance and support by allowing the UAW to meet with employees during orientation sessions and worktime in order to urge the employees to sign membership applications and checkoff authorizations.

(f) Assisting, recognizing and bargaining with the UAW as the collective-bargaining representative of the employees who are employed at the Ford Motor Company, Louisville, Kentucky assembly plant performing vehicle processing including staging, shuttle and yard/inventory, and batch and hold work, when the UAW did not represent an uncoerced majority of the unit employees and at a time before the commencement of Voith's normal vehicle processing operations when it did not employ a representative segment of its ultimate vehicle processing employee complement.

(g) Telling an applicant that if he was hired, he would have to become a member of the UAW.

(h) Informing an applicant that in order to be hired, he would have to refrain from engaging in Section 7 activity such as striking.

(i) Threatening to discharge employees if they did not wear a safety vest bearing the UAW logo.

(j) Denying Teamsters Local 89 access to its employees while granting access to the UAW.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with Teamsters Local 89 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and if an understanding is reached, embody the understanding in a signed agreement:

All employees as set forth in Article 3 of the National Master Automobile Transporters Agreement, Central and Southern Area Supplemental Agreements and the Job Descriptions provisions of the Local Rider.

(b) Notify Teamsters Local 89 in writing that it recognizes that Union as the exclusive representative of its unit employees under Section 9(a) of the Act and that it will bargain with that union concerning terms and conditions of employment for employees in the unit.

(c) At the request of Teamsters Local 89, rescind any departures from terms and conditions of employment that existed immediately prior to Respondent Voith's takeover of predecessor Auto Handling's operation, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, until it negotiates in good faith with Teamsters Local 89 to agreement or to impasse.

(d) Make the unit employees whole, in the manner set forth in the remedy section of the judge's decision as modified herein, for any losses caused by Respondent Voith's failure to apply the terms and conditions of employment that existed immediately prior to its takeover of predecessor Auto Handling's operation.

(e) Withdraw and withhold all recognition from the UAW and its Local 862 as the exclusive collective-bargaining representative of its vehicle processing employees unless and until the UAW has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

(f) Within 14 days from the date of this Order, offer employment to the former unit employees of Auto Handling named in attachment A to the judge's decision as well as the other similarly situated employees on the Auto Handling seniority list, including those who did not file individual applications with Respondent Voith, and to any other Teamsters-affiliated applicants who filed

applications with Respondent Voith and would have been hired but for its unlawful discrimination against them, in the positions previously held by Auto Handling employees or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any full-time or temporary employees hired in their place. Positions shall be offered to employees on the former Auto Handling seniority list in the order they appear on that list, followed by the other Teamsters-affiliated applicants according to the dates appearing on their applications. If there are insufficient positions available, the remaining employees shall be placed on a preferential hiring list.

(g) Make the employees referred to above in paragraph 2(f) whole for any loss of earnings and other benefits they may have suffered by reason of Respondent Voith's unlawful refusal to hire them, in the manner set forth in the remedy section of the judge's decision as modified herein.

(h) Within 14 days from the date of this decision, remove from its files any reference to the unlawful refusal to hire the employees described above in paragraph 2(f), and within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(i) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(j) Make whole any Teamsters-affiliated employees who were "belatedly hired" as a result of Respondent Voith's discriminatory failure to timely hire them, for any loss of earnings and other benefits they may have suffered by reason of Respondent Voith's unlawful refusal to timely hire them, plus interest.

(k) Rescind its contract with Aerotek, Inc. to perform work which otherwise would have been performed by the employees on the Auto Handling seniority list or other Teamsters-affiliated applicants, and offer any jobs created by this rescission to the employees described above in paragraph 2(f), as set forth therein.

(l) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for

good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(m) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix A."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent Voith's authorized representative, shall be posted by Respondent Voith and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Voith to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent Voith has gone out of business or closed the facility involved in these proceedings, Respondent Voith shall duplicate and mail, at its own expense, a copy of the notice to all employees on the Auto Handling seniority list and all current employees and former employees employed by Respondent Voith at any time since January 31, 2012.

(n) Post at the same places and under the same conditions, copies of Appendix B as soon as it is forwarded by the Regional Director.

(o) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice, Appendix A, is to be read to the employees by a responsible management official or, at Respondent Voith's option, by a Board agent in that official's presence. Respondent Voith shall also afford Teamsters Local 89, through the Regional Director, reasonable notice and opportunity to have a representative present when the notice is read to employees.

(p) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The National Labor Relations Board orders that the Respondent, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO and

²⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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Local 862, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting assistance and support from Respondent Voith in order to meet with employees to urge them to sign membership applications and checkoff authorizations.

(b) Obtaining recognition from Respondent Voith at a time that the UAW does not represent an uncoerced majority in the unit and when Respondent Voith has not started normal vehicle processing operations nor employed in the unit a representative segment of its ultimate vehicle processing employee complement.

(c) Accepting recognition from Respondent Voith unless it is certified by the National Labor Relations Board as the exclusive collective-bargaining representative of its vehicle processing employees.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its offices and meeting halls copies of the attached notice marked "Appendix B."²¹ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the UAW's authorized representative, shall be posted by the UAW and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the UAW to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 14 days after service by the Region, sign and return to the Regional Director sufficient copies of Appendix B for posting by Respondent Voith at all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

²¹ See fn. 20, *supra*.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 17, 2016

Mark Gaston Pearce,

Chairman

Kent Y. Hirozawa,

Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, the Board finds that Voith Industrial Services, Inc. (the Respondent or Voith) attempted to avoid becoming a legal "successor" by refusing to hire 85 Teamsters-represented applicants who previously worked for its predecessor, Auto Handling, Inc.¹ I agree that Voith should be considered a legal successor whose refusal to recognize and bargain with Teamsters Local 89 (the Union) violated Section 8(a)(5) of the National Labor Relations Act (the NLRA or the Act). I also agree that Voith's discriminatory refusal to hire the 85 applicants violated Section 8(a)(3). However, my colleagues and I part ways regarding three aspects of this case.

First, I believe my colleagues violate due process principles and exceed the Board's remedial authority. Rather than imposing the standard remedies formulated by the judge by requiring Voith to make whole and offer em-

¹ Successorship cases are those involving a transition in employers, most often caused by the sale of a business or contract rebidding. For example, here, Auto Handling, Inc. provided vehicle processing and inventory management services at Ford Motor Company's, Louisville, Kentucky assembly plant under a contract with Ford, and in 2012 Ford awarded the contract to Voith. In these cases, the new employer must recognize and bargain with the predecessor's union if there is sufficient business continuity and a "workforce majority," i.e., if a majority of the successor's work force consists of represented employees who were previously employed by the predecessor. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). However, even if the new employer is considered a legal "successor" obligated to recognize and bargain with the union, the Supreme Court has held it has the right to unilaterally set different initial employment terms, and it is not required to adopt the predecessor's collective-bargaining agreement. *Id.* If the new employer engages in antiunion discrimination during hiring to avoid having a work force majority in an effort to defeat "successor" obligations, this violates Sec. 8(a)(3) of the Act, and the Board will require the successor to recognize and bargain with the union. *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 81-82 (1979), *enfd.* in relevant part sub nom. *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

ployment to the 85 applicants it unlawfully refused to hire, my colleagues order Voith to provide these same remedies to 182 additional beneficiaries even though (i) none of these 182 additional beneficiaries were identified in the complaint; (ii) 101 of the additional beneficiaries never worked for the predecessor, Auto Handling; and (iii) 81 of the additional beneficiaries never applied for employment with Voith. I believe the inclusion of these 182 additional individuals in the Board's remedy violates fundamental principles of due process. I also believe their inclusion exceeds the Board's remedial authority, and the evidence is insufficient to establish an independent finding of liability as to these individuals.

Second, for reasons that I previously explained in *CNN America, Inc. and Team Video Services, LLC*,² I dissent from the majority's finding that the Respondent violated Section 8(a)(5) by unilaterally establishing initial terms and conditions of employment. Under well-established Supreme Court precedent, a successor employer has the right to set different initial employment terms even though it must otherwise recognize and bargain with the predecessor's union. *NLRB v. Burns Security Services*, supra; *Fall River Dyeing & Finishing Corp. v. NLRB*, supra.³

Third, I disagree with my colleagues' finding that Voith violated Section 8(a)(5) by failing to give the Union notice and the opportunity for bargaining over the outsourcing of certain work to another company, Aerotek, Inc.⁴ When this subcontracting decision was made, Voith did not yet have a "substantial and representative complement" of employees, one of the conditions that must be satisfied before a new employer will have 8(a)(5) "successorship" obligations. Thus, in my view, the Board cannot properly find that Voith violated Section 8(a)(5) when it outsourced work to Aerotek.⁵

² 361 NLRB No. 47, slip op. at 43-44 (2014) (Member Miscimarra, concurring in part and dissenting in part).

³ As explained below and in my partial dissent in *CNN America*, I disagree with this aspect of *Love's Barbeque Restaurant No. 62*, supra, where the Board held that a successor that engages in antiunion discrimination in an effort to avoid successorship obligations forfeits its legal right to unilaterally set different initial employment terms.

⁴ A decision to engage in outsourcing—to have work performed by a third-party contractor—is also sometimes referred to as subcontracting. Although these terms might sometimes have different meanings, I use the two terms interchangeably in this opinion.

⁵ I agree with my colleagues that Voith violated Sec. 8(a)(1) by threatening to send employees home if they refused to wear a safety vest bearing the logos of the United Auto Workers (the UAW) and Voith. However, my colleagues base their finding on the fact that "the UAW was not the duly constituted exclusive collective-bargaining representative" of Voith's employees, implying that Voith would not have violated the Act had the UAW been the employees' duly constituted bargaining representative. I do not agree that Voith's conduct would have been lawful if the UAW had been the representative of

Discussion

A. The Board Cannot Order Relief for Individuals who were Not Identified in the Complaint, who did Not Work for the Predecessor, or who did Not Apply for Employment with Voith

"To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case." *Lamar Central Outdoor d/b/a Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004) (quoting *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992)); see also *KenMor Electric Co., Inc. and H&J Electric Co. and Louis P. Lee d/b/a L.L. Electric Co. and Independent Electrical Contractors of Houston, Inc.*, 355 NLRB 1024, 1029 (2010) ("Due process requires that a respondent have notice of the allegations against it so that it may present an appropriate defense."), enf. denied sub nom. *Independent Electrical Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543 (5th Cir. 2013); *The Earthgrains Co.*, 351 NLRB 733, 735 (2007) ("The fundamental elements of procedural due process are notice and an opportunity to be heard."). Typically, appropriate notice is furnished by the allegations set forth in the complaint. *KenMor Electric*, supra. However, the Board will also consider any representations made by the General Counsel on a timely basis during the course of litigation concerning the theory of the alleged violation. See *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 180, slip op. at 4 (2015); *Iron Workers Local 118, International Association of Bridge and Structural Ironworkers, AFL-CIO (Pittsburgh Des Moines Steel Co.)*, 257 NLRB 564, 565-566 (1981), enf. 720 F.2d 1031 (9th Cir. 1983).

Here, neither the charge, the complaint, nor any representation made by attorneys representing the General

Voith's employees at the time. Sec. 7 protects the right of employees to refrain from wearing union insignia, and this right is unaffected by whether or not the union is a certified or recognized representative. See *Lee v. NLRB*, 393 F.3d 491 (4th Cir. 2005) (holding that employer and lawful collective-bargaining representative violated the Act by entering into an agreement requiring bargaining unit employees to wear a uniform bearing union and company logos).

I also believe my colleagues erroneously state that Voith is required to post Respondent UAW's notice to employees. Consistent with the Board's standard practice, the UAW should be ordered to sign and return to the Regional Director sufficient copies of the notice for posting by the respondent employer if it is "willing" to do so. See, e.g., *CC 1 Limited Partnership d/b/a Coca Cola Puerto Rico Bottlers*, 362 NLRB No. 125, slip op. at 5 (2015); *Dean Transportation, Inc.*, 350 NLRB 48, 62 (2007); *Northwest Protective Service, Inc.*, 342 NLRB 1201, 1212 (2004); *North Hills Office Services*, 342 NLRB 437, 447 (2004); *St. Helens Shop 'N Kart*, 311 NLRB 1281, 1288 (1993); *Newport News Shipbuilding and Dry Dock Company*, 253 NLRB 721, 734 (1980).

Counsel put Voith on notice that it was alleged to have discriminated in hiring against 182 individuals who either never applied for employment with Voith or never worked for Voith's predecessor, Auto Handling. From the filing of the unfair labor practice charges to the close of the hearing, the 8(a)(3) hiring allegations were framed and litigated exclusively on the theory that Voith engaged in hiring discrimination against *applicants* (i.e., individuals who submitted employment applications to Voith) who had *previously worked for Auto Handling*.

The charge filed on April 12, 2012, alleged that Voith "refused to hire, or consider for hire, the employees of its predecessor employer at that location, Auto Handling, Inc., a subsidiary of Jack Cooper Transport Company, because such employees are Teamsters members and have designated Teamsters Local Union No. 89 as their collective-bargaining representative, in order for Voith to attempt to avoid its bargaining obligations regarding the terms and conditions of employment of such employees as the successor Employer at that location."

Similarly, the complaint alleged that Voith unlawfully refused to hire applicants who had worked for the predecessor employer in an attempt to avoid a successor bargaining obligation:

9 (a) About January 31, 2012, Respondent Voith implemented a plan to hire about 84 employees and established a hiring procedure and engaged in other conduct designed to exclude and/or limit the hiring of applicants who were former employees of Cooper Transport⁶ or members of Teamsters Local 89.

(b) Since about February 17, 2012, Respondent Voith has failed and refused to hire or consider for hire *the former employees of Cooper Transport listed on Exhibit A attached hereto, who were members of the [Teamsters Local 89] bargaining unit* described below in paragraph 10, and others similarly situated.

(c) Respondent Voith engaged in the conduct described above in paragraphs 9(a) and (b) because *the former employees of Cooper Transport were members of Teamsters Local 89, engaged in concerted activities, and to discourage employees from engaging in these activities and in order to avoid an obligation to recognize and bargain with Teamsters Local 89 as the exclusive collective-bargaining representative of the employees described below in paragraph 10.*⁷

⁶ Predecessor Auto Handling was a subsidiary of Cooper Transport.

⁷ Complaint para. 9(a)-(c) (emphasis added).

Even more explicit is appendix A to the complaint, as amended at the hearing, which is referred to in complaint paragraph 9(b) above. Appendix A *identifies 85 alleged discriminatees by name*, all of whom have two attributes in common, consistent with the premise of the unfair labor practice charges and the text of the complaint: (i) each listed discriminatee previously worked for predecessor employer Auto Handling, and (ii) each listed discriminatee submitted an application for employment to the Respondent. Appendix A of the complaint, as amended, does not name a single person in either of the two large groups added to the Order by the majority today. As noted previously, these 182 additional individuals include 101 Teamsters-affiliated individuals who never worked for predecessor Auto Handling (I call these individuals the "101 nonpredecessor applicants") and 81 former employees of Auto Handling who never applied for employment with Voith (I call these individuals the "81 nonapplicants").

There is no doubt that the General Counsel knew the identities of the 101 nonpredecessor applicants and the 81 nonapplicants at the time of the hearing. This is clear because the General Counsel introduced into evidence (i) Auto Handling's seniority list, which contained the names of the 81 nonapplicants (as well as the names of the 85 Auto Handling employees who did apply for jobs with Voith), and (ii) the employment applications submitted to Voith, which included the 101 nonpredecessor applicants.

Not only did the General Counsel fail to put Voith on notice that he was seeking relief for individuals in addition to the discriminatees named in appendix A to the complaint, the attorneys representing the General Counsel at the hearing *confirmed* that only former employees of Auto Handling who applied to Voith for employment were at issue. Thus, during the hearing, the General Counsel moved to amend appendix A to add one more individual, Patsy Bowman-Miles, to the list of alleged discriminatees. The Respondent's counsel objected to the proposed amendment, arguing that he was "unaware of any basis to support the notion that she was an employee of Auto Handling, Inc. as alleged . . . in the Complaint with respect to the remainder of Appendix A." The judge responded that the General Counsel would bear the burden of proving that Bowman-Miles had been an employee of the predecessor and granted the motion to amend the complaint "with that understanding." Counsel for the General Counsel never argued it was immaterial whether Bowman-Miles worked for the predecessor, which it would have been if the General Counsel was also alleging unlawful discrimination against persons who had never been employed by Auto Han-

dling. This reinforces the fact that the General Counsel's hiring discrimination allegations were limited to alleged antiunion discrimination against *former employees of Auto Handling, perpetrated by Voith in an attempt to avoid a successor bargaining obligation*. Only after the hearing's conclusion did the General Counsel make any argument—in his posthearing brief to the judge—that Voith also engaged in unlawful antiunion discrimination against the 81 nonapplicants and the 101 nonpredecessor applicants.

Any theory of 8(a)(3) discrimination regarding the 101 nonpredecessor applicants and the 81 nonapplicants would have to involve questions of proof materially different from those relevant to the complaint's 8(a)(3) allegations, which related exclusively to former Auto Handling employees who applied for positions with Voith. The General Counsel's theory alleged in the complaint and litigated at the hearing involved alleged discrimination by Voith *to avoid a finding of successorship*. Under *Burns* and *Fall River Dyeing*, *supra*, a new employer's potential 8(a)(5) bargaining obligations depend in part on whether a majority of the successor's employees consisted of union-represented employees *who worked for the predecessor*. Under this theory, the only potential discriminatees encompassed by the complaint were *former employees of Auto Handling* (the predecessor) whose *applications for employment with Voith* were unlawfully denied.

Had the General Counsel put forward at the hearing any theory of discrimination regarding the 101 nonpredecessor applicants (people who applied to Voith but were never employed by Auto Handling), Voith would have had an opportunity to introduce evidence regarding why particular nonpredecessor applicants were not hired. However, this opportunity was denied to Voith, since it had no notice that these individuals were at issue. Voith had no reason to introduce evidence regarding the 101 nonpredecessor applicants because the theory of the complaint did not pertain to these individuals.

Regarding the 81 nonapplicants (former Auto Handling employees who never applied for Voith positions), I have difficulty understanding how the General Counsel could even claim hiring discrimination by Voith, since they did not even apply for positions with Voith. The General Counsel's theory through the end of the hearing clearly did not encompass the 81 nonapplicants. As noted previously, a *Burns/Fall River* "successorship" analysis turns on whether Voith hired, as a majority of its work force, applicants who previously worked for predecessor Auto Handling. This analysis would be completely unaffected by former Auto Handling employees who

did not even submit applications to Voith. Had such a theory been introduced before the close of the hearing, Voith would have had an opportunity to explain why hiring decisions were limited to individuals who submitted applications, or it could have otherwise introduced evidence regarding why it did not hire the nonapplicants. Again, these opportunities were denied to Voith based on the absence of notice that the 81 nonapplicants were at issue.

My colleagues recognize they have a due process problem in awarding a remedy based on violations that (i) were not alleged in the complaint; (ii) were not the subject of timely representations by the General Counsel's attorneys at the hearing modifying the theory of the General Counsel's case; and (iii) more than *tripled* the number of individuals who must be hired (or placed on a preferential hiring list) with backpay by the Respondent. To deal with this problem, the majority embraces three arguments that, in my view, are strained to a degree that reinforces a much more obvious point: neither the complaint, nor the hearing, nor the evidentiary record provides reasonable support for the posthearing remedial expansions sought by the General Counsel and granted by the majority. Nonetheless, I will briefly address each of the three arguments in turn.

First, my colleagues look in isolation at complaint paragraph 9(a), which states in part that Voith "established a hiring procedure . . . designed to exclude and/or limit the hiring of applicants who were former employees of [Auto Handling] or members of Teamsters Local 89." According to the majority, Voith should have realized from the word "or" that the complaint alleges discrimination against *all* "members of Teamsters Local 89," even if those members were never Auto Handling employees (i.e., the 101 nonpredecessor applicants), and even if those members never even applied for jobs with Voith (i.e., the 81 nonapplicants). I believe this interpretation is unreasonable. Viewed in context, the phrase "or members of Teamsters Local 89" in subparagraph 9(a) is most naturally read as an alternative description of the 85 alleged discriminatees named in appendix A—i.e., the "former employees" of Auto Handling, who could also accurately be referred to as "members of Teamsters Local 89," who Voith refused to hire in an attempt to avoid legal "successor" status. This mirrors the structure of subparagraph 9(b), which states Voith unlawfully refused to hire "the former employees of Cooper Transport listed on Exhibit A attached hereto, who were members of the [Teamsters Local 89] bargaining unit," and of subparagraph 9(c), which states the unlawful refusals occurred "because the former employees of [Auto Handling] were members of Teamsters Local 89."

The majority's interpretation of the word "or" and the phrase "or members of Teamsters Local 89" in subparagraph 9(a) disregards the fact that the entire theory of violation expressed in the charge and in paragraph 9 of the complaint was premised on Voith's alleged effort to avoid having a successor "obligation to recognize and bargain" (par. 9(c)), which (as noted above) had no logical connection to the 101 nonpredecessor applicants or the 81 nonapplicants. The majority's interpretation also disregards the exchange during the hearing about the newly identified alleged discriminatee, Bowman-Miles, in which the judge indicated that the General Counsel would have to prove that Bowman-Miles had worked for Auto Handling. Finally, the majority's interpretation also disregards the fact that the alleged discriminatees were identified by name, in exhibit A attached to the complaint, and described in subparagraph 9(b) as the "former employees of [Auto Handling] . . . who were members of the [Teamsters Local 89] bargaining unit." Given these considerations, I believe the majority goes too far in suggesting the phrase "or members of Teamsters Local 89" in subparagraph 9(a) placed Voith on notice that this litigation involved *three times* the number of discriminatees listed in exhibit A, including individuals who—*unlike* the discriminatees listed in appendix A—never worked for Auto Handling (the 101 nonpredecessor applicants) or never applied for jobs with Voith (the 81 nonapplicants). Even giving the most liberal interpretation possible to the phrase "or members of Teamsters Local 89," the majority's interpretation does not pass the test of fundamental fairness because these words do not constitute the required "clear statement of the theory on which the agency will proceed with the case." *Lamar Advertising of Hartford, supra*.⁸

Second, my colleagues find that the phrase "and others similarly situated" at the end of subparagraph 9(b) placed Voith on notice that the General Counsel sought instate-

ment of and make-whole relief for the 81 nonapplicants. Again, subparagraph 9(b) states:

(b) Since about February 17, 2012, Respondent Voith has failed and refused to hire or consider for hire the former employees of [Auto Handling] listed on Exhibit A attached hereto, who were members of the [Teamsters Local 89] bargaining unit described below in paragraph 10, and others similarly situated.⁹

To state the obvious, the phrase "others similarly situated" contains the word "similarly." Thus, it refers to anyone similarly situated to the alleged discriminatees listed in exhibit A—namely, "*former employees of [Auto Handling] . . . who were members of the [Teamsters Local 89] bargaining unit*" who Voith refused to hire. The discriminatees listed in exhibit A shared three key characteristics: (1) they all worked for Auto Handling (unlike the 101 nonpredecessor applicants); (2) they all applied for jobs with Voith (unlike the 81 nonapplicants);¹⁰ (3) they all logically would have been disfavored by Voith to avoid a successor bargaining obligation (unlike the 101 nonpredecessor applicants and the 81 nonapplicants, none of whom logically would have been disfavored because of Voith's desire to avoid legal successorship). In short, the 81 nonapplicants are not "similarly situated" to the exhibit A discriminatees in any manner that is consistent with the charge, the complaint, or the General Counsel's theory of the case throughout the hearing. Therefore, I believe the Board cannot reasonably find that the phrase "similarly situated" reasonably placed Voith on notice that this litigation encompassed these additional individuals.¹¹

⁹ Complaint par. 9(b) (emphasis added).

¹⁰ A failure to apply is excused only where an alleged successor employer has conveyed to employees of the predecessor that submitting an application would be futile. See, e.g., *Shortway Suburban Lines*, 286 NLRB 323, 326 (1987). Thus, the 81 nonapplicants are not "similarly situated" to the individuals named in app. A because finding the Respondent's rejection of the former group unlawful would require a significant legal analysis not applicable to the latter group. The evident purpose of adding the phrase "others similarly situated" to subpar. 9(b) was to preserve the General Counsel's right to amend app. A by adding one or more individuals previously employed by predecessor Auto Handling who applied for employment with Voith.

In fact, as noted in the text, the General Counsel at the hearing moved to augment ex. A with another alleged discriminatee, Patsy Bowman-Miles, and it is significant that (i) Bowman-Miles submitted an application to Voith (unlike the 81 nonapplicants), and (ii) the judge granted this motion conditioned on the General Counsel proving that Bowman-Miles had been employed by Auto Handling (unlike the 101 nonpredecessor applicants). This reinforces the fact that the 81 nonapplicants cannot reasonably be considered "similarly situated" to the ex. A discriminatees.

¹¹ The individuals in the group of 81 did not apply for employment with the Respondent merely by virtue of appearing on the predecessor's seniority list. As the majority notes, Teamsters Local 89, by letter dated February 14, 2012, urged the Respondent to reach out and notify

⁸ In his opening statement at the hearing, the General Counsel stated that "in its essence, this trial is about Respondent Voith's actions in seeking to avoid a bargaining obligation with Teamsters 89, and to establish a bargaining relationship with its preferred union, the UAW." Contrary to the majority, that opening statement does not reasonably convey that the General Counsel was alleging that the Respondent violated Sec. 8(a)(3) and (1) by discriminatorily refusing to hire 101 applicants who never worked for the predecessor and were not named in the complaint. Given that every individual identified in appendix A is an applicant who formerly worked for the predecessor, Voith would have reasonably understood that the referenced "actions in seeking to avoid a bargaining obligation with Teamsters 89, and to establish a bargaining relationship with its preferred union, the UAW" were its unlawful refusals to hire those 85 named individuals. Nothing in the General Counsel's words reasonably informed Voith that it was alleged to have discriminated against anyone other than applicants formerly employed by the predecessor employer.

Third, the majority finds that Voith was “fully apprised” that the 101 nonpredecessor applicants were alleged discriminatees because their employment applications were entered as exhibits at the hearing. Including employment applications in the record does not reasonably inform Voith that the 101 nonpredecessor applicants were at issue as claimants here. It is well established that “the simple presentation of evidence important to a . . . claim does not satisfy the requirement that any claim at variance from the complaint be ‘fully and fairly litigated’ in order for the Board to decide the issue without transgressing . . . due process rights.” *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 547 (7th Cir. 1987).¹² In a case involving alleged antiunion discrimination, the record often contains employment applications submitted by persons not alleged to be discriminatees. These other employment applications are frequently used as a basis for comparison when evaluating the reasons provided by the employer for failing to hire the alleged discriminatees.¹³ The “simple presentation” of these additional employment applications, and their admission as exhibits, does not reasonably provide notice of completely new or different theories that were not articulated in the charge or complaint, nor did this reasonably place Voith on notice that the General Counsel was seeking instatement of and make-whole relief for more than three

the predecessor's employees about hiring opportunities and attached the predecessor's seniority list. However, the Union's letter does not constitute any sort of group “application,” and there is no evidence that Teamsters Local 89, before sending its letter, conferred with any of the 81 nonapplicants or inquired whether they wished to be employed by the Respondent. For all the record shows, the 81 nonapplicants had moved on to new endeavors and were not interested in working for the Respondent.

Additionally, the majority errs in concluding that the predecessor's employees reasonably expected to be hired by the Respondent without submitting an employment application simply because the president of Teamsters Local 89 testified that the predecessor's collective-bargaining agreement required a successor employer to utilize the predecessor's seniority list. The predecessor's collective-bargaining agreement does not bind the Respondent. *NLRB v. Burns International Security Service*, 406 U.S. at 281–290.

¹² See also *Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983) (“[T]he presence of evidence in the record to support a charge unstated in a complaint or any amendment thereto does not mean the party against whom the charge is made had notice that the issue was being litigated.”); *Cioffe v. Morris*, 676 F.2d 539, 542 (11th Cir. 1982) (“[T]he introduction of evidence relevant to an issue already in the case may not be used to show consent to trial of a new issue absent a clear indication that the party who introduced the evidence was attempting to raise a new issue” (internal quotations omitted)).

¹³ For example, the other application, if submitted by someone who was not hired, may support the employer's defense if it was similar to an application from one of the alleged discriminatees. By the same token, the other application, if submitted by someone who was hired, may undermine the employer's defense if it was similar to an application submitted by one of the alleged discriminatees.

times the number of alleged discriminatees in this case. Satisfying the requirements of due process is critically important, but it is not difficult: the General Counsel must provide a “clear statement of the theory on which the agency will proceed with the case.” *Lamar Advertising of Hartford*, supra. The General Counsel did so with regard to the 85 applicants who previously worked for Auto Handling. I believe he clearly did not do so with regard to the 101 nonpredecessor applicants and the 81 nonapplicants.

Putting aside the due process question, I believe the Board also exceeds its remedial authority by ordering hiring and make-whole relief for the 81 nonapplicants and the 101 nonpredecessor applicants. As I discussed in *HTH Corp., Pacific Beach Corp., and KOA Management, LLC, a Single Employer, d/b/a Pacific Beach Hotel*,¹⁴ the Board's remedial authority, though broad, is strictly limited to measures that are remedial, not punitive. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940) (citing *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 235–236 (1938)); *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267–268 (1938). The Board is not “free to set up any system of penalties which it would deem adequate” to “have the effect of deterring persons from violating the Act.” *Republic Steel*, 311 U.S. at 12. The Board's authority to devise remedies “does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.” *Consolidated Edison*, 305 U.S. at 235–236 (emphasis added). As the Supreme Court stated in *Republic Steel*: “We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act.” 311 U.S. at 11 (emphasis added).

In the instant case, I believe there is no plausible basis for fashioning a remedy, logically connected to Voith's status as a legal “successor,” for the 101 nonpredecessor applicants and the 81 nonapplicants. Based on the theory of the case, the General Counsel alleged in the complaint and litigated at the hearing—that Voith manipulated its hiring decisions to defeat “successor” status—Voith would have an incentive to hire the 101 nonpredecessor applicants. Again, “successor” status under *Burns* and *Fall River Dyeing* arises only if, among other prerequi-

¹⁴ 361 NLRB No. 65, slip op. at 19 (2014) (Member Miscimarra, concurring in part and dissenting in part).

sites, a majority of the successor's work force consists of employees of the predecessor. Therefore, hiring the 101 nonpredecessor applicants—individuals who did *not* work for predecessor Auto Handling—would have *helped* Voith establish that it lacked a work force majority consisting of former Auto Handling employees. Stated differently, the Board cannot require Voith to hire and give backpay to the 101 nonpredecessor applicants as a “remedy” for Voith's unlawful discrimination in hiring to avoid successor status because Voith's unlawful conduct could not plausibly have contributed to their lack of employment. To the contrary, Voith's unlawful discrimination, if anything, militated in *favor* of their being hired by Voith.¹⁵

The “remedy” fashioned by my colleagues is even more clearly inappropriate in relation to the 81 nonapplicants. Again, if one accepts the theory that Voith manipulated its hiring decisions to defeat “successor” status, Voith was only in a position to make such decisions regarding Auto Handling employees who applied for positions with Voith. Under the General Counsel's theory of liability, the Board must fashion a remedy for Voith's discriminatory decisions not to hire employees of predecessor Auto Handling. This remedy can only appropriately require Voith to hire and provide backpay to individuals as to whom Voith actually made such “decisions.” Regarding the 81 nonapplicants, Voith made no decisions at all, since these individuals did not even apply for jobs with Voith.¹⁶

¹⁵ As explained in the text, hiring the 101 nonpredecessor applicants would have advanced Voith's efforts to avoid a successor obligation under *Burns* and *Fall River Dyeing* because their hiring would have reduced the ratio of predecessor employees in Voith's work force. Putting aside Voith's unlawful discrimination for the purpose of avoiding a successor bargaining obligation, the record is devoid of evidence sufficient to establish that general antiunion hostility was a motivating factor in Voith's hiring decisions regarding the 101 nonpredecessor applicants. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

¹⁶ As to the 81 nonapplicants, I disagree with the majority's finding that the Respondent conveyed to the predecessor's employees that it would be futile for them to submit applications. The majority seems to suggest that the Respondent's discriminatory hiring decisions regarding individuals who *applied* for jobs with Voith imposed on it a duty to persuade other Auto Handling employees to apply as well—and then the majority presumes that if the nonapplicants had applied, Voith would have discriminatorily failed to hire them. As a factual matter, the record renders indefensible the majority's “futility” finding because so many of the predecessor's employees *did* submit applications, and several of these predecessor employees were hired. Moreover, as a legal matter, this theory is unreasonable because it effectively creates a type of “class action” litigation regarding 8(a)(3) discrimination claims, where an employer's discrimination regarding certain employees becomes the basis for finding 8(a)(3) liability regarding other employees as to whom the employer made no hiring decision at all.

B. Voith was Not Bound by Auto Handling's CBA and had the Right to Unilaterally Set Different Initial Terms of Employment

The Supreme Court has repeatedly held that a successor employer, though obligated to recognize and bargain with the union that represented the predecessor's employees, has no obligation to adopt the predecessor's collective-bargaining agreements. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. at 40; *NLRB v. Burns Security Services*, 406 U.S. at 272. Additionally, a successor employer obligated to recognize and bargain with the predecessor's union is free to unilaterally establish its own initial terms of employment. *Id.*¹⁷

I agree that Voith was a legal successor obligated to recognize and bargain with the Union, and it unlawfully failed to do so. I believe, however, that Voith still had a right to unilaterally set different initial terms and conditions of employment. In reliance on *Love's Barbeque*,¹⁸ my colleagues find that Voith forfeited this right by engaging in hiring discrimination against its predecessor's employees. However, as stated in my separate opinion in *CNN America, Inc.*,¹⁹ I disagree with this aspect of *Love's Barbeque* because it inappropriately deviates from the Supreme Court's holdings in *Burns*, *supra*, and *Fall River Dyeing*, *supra*, that a predecessor's contractual obligations do not bind a legal successor. If an employer engages in discriminatory hiring in an effort to defeat legal successor status, the appropriate remedy is to order the employer to hire the discriminatees and make them whole. The Board can also appropriately require a legal successor to recognize and bargain with the predecessor's union, but the successor remains free to unilaterally set different initial employment terms. Regarding these issues, I believe the Board is constrained by *Burns* and *Fall River Dyeing*, in addition to Section 8(d) of the Act, from imposing substantive contract terms on the successor.²⁰ See also *H. K. Porter Co. v. NLRB*, 397 U.S. 99,

¹⁷ In *Burns*, the Supreme Court recognized a limited exception to the successor's right to unilaterally set different initial terms of employment where “it is perfectly clear that the new employer plans to retain all of the employees in the unit,” in which case “it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.” 406 U.S. at 294–295. The General Counsel does not contend that the “perfectly clear” exception applies in this case.

¹⁸ 245 NLRB at 82.

¹⁹ 361 NLRB No. 47, slip op. at 43–44. See also *Pacific Custom Materials, Inc.*, 327 NLRB 75, 75–76 (1998) (Member Hurligen, dissenting).

²⁰ Sec. 8(d) defines the obligation to “bargain collectively” as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question

107–108 (1970) (“It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties.”). In this respect, I also agree with the reasoning of former Member Hurtgen in *Pacific Custom Materials*, who stated: “The 8(a)(3) violations yield their own compensatory remedy of reinstatement and backpay. It is excessive and punitive to use those 8(a)(3) violations to take away the legitimate defense to an 8(a)(5) allegation concerning the setting of initial terms. . . . In addition, even if the Board’s position [in *Love’s Barbeque*] is a permissible one, it would seem that the position set forth herein is a more prudent one, more balanced concerning a successor employer’s obligations, and is more consistent with the Supreme Court’s language.” 327 NLRB at 75–76 (Member Hurtgen, dissenting) (paragraph structure modified).²¹

C. Voith had No Obligation to Engage in Bargaining Over the Aerotek Subcontracting

As a final matter, I disagree with my colleagues’ finding that Voith violated Section 8(a)(5) based on a failure to give the Union notice and the opportunity for bargaining over the subcontracting of certain work to Aerotek, Inc.²² In successorship cases, the successor employer’s

arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .” (Emphasis added.)

²¹ To the extent the Board continues to apply *Love’s Barbeque’s* holding that a successor employer forfeits its right to set its own initial terms when it engages in hiring discrimination, I would permit a respondent to limit its make-whole liability by proving at the compliance stage that it would not have agreed to the monetary provisions of its predecessor’s collective-bargaining agreement and the date when and terms on which it would have bargained either to an agreement or impasse. See *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 6–12 (2014) (Members Miscimarra and Johnson, dissenting).

²² In finding that Voith violated Sec. 8(a)(5) when it decided to subcontract certain work to Aerotek, my colleagues reason that this decision was part of Voith’s “discriminatory hiring scheme.” I note that the complaint alleges that Voith’s subcontracting was unlawful because it was done unilaterally in violation of Sec. 8(a)(5) and (1) of the Act. See Complaint pars. 12(b)–(d), 26. The complaint does not allege that Voith’s subcontracting was unlawful under Sec. 8(a)(3) and (1) because Voith’s decision to subcontract was unlawfully motivated. To be sure, as my colleagues note, par. 6 of the complaint alleges that Aerotek was Voith’s agent for purposes of hiring Voith’s employees—and as stated above, I join the majority in finding that Voith, through Aerotek, violated Sec. 8(a)(3) by refusing to hire the 85 individuals listed in app. A of the complaint to avoid a successorship bargaining obligation with the Teamsters. But the complaint’s allegations of hiring discrimination are clearly limited to those 85 individuals. The Aerotek subcontract was not similarly limited. In addition to screening applicants for positions with Voith, Aerotek also supplied Voith with temporary employees under the subcontract. The General Counsel challenged Voith’s decision to subcontract all this work solely as an unlawful unilateral action

obligation to recognize and bargain with the union commences only if and when two conditions are met: (1) the union demands recognition or bargaining; and (2) the successor is engaged in normal operations with a “substantial and representative complement” of employees, a majority of whom were employed by the predecessor.²³

The record here establishes that, on March 1, 2012, Voith contracted with Aerotek, a staffing agency, to furnish Voith with employees to perform vehicle processing and inventory management services, i.e., yard work.²⁴ There is no evidence that the Respondent had begun normal operations with a substantial and representative complement of employees in the yard *before* it contracted with Aerotek. Indeed, the record affirmatively establishes that Voith did not commence normal operations in the yard until sometime between April 9 and May 1. By the time normal operations commenced, Voith employed approximately 300 yard workers, the vast majority of whom had been referred to Voith by Aerotek pursuant to the March 1, 2012 Voith-Aerotek contract. Thus, I believe the record establishes that Voith had no obligation to provide the Union notice and the opportunity for bargaining over the Aerotek subcontracting arrangement because when this arrangement was entered into, Voith was not engaged in normal operations with a substantial and representative complement of employees.²⁵

under Sec. 8(a)(5), not as a discriminatorily motivated decision under Sec. 8(a)(3). To afford Voith due process, I believe the Board must limit its analysis of the subcontracting allegation to established 8(a)(5) principles. And as explained below, no 8(a)(5) violation lies here because Voith was not yet obligated to recognize and bargain with the Teamsters when it contracted with Aerotek.

²³ *St. Elizabeth Manor, Inc.*, 329 NLRB 341, 344 fn. 8 (1999) (citing *Royal Midtown Chrysler Plymouth*, 296 NLRB 1039, 1040 (1989)); *Local Union No. 274, Hotel Employees & Restaurant International Union, AFL-CIO (Stadium Hotel Partners)*, 314 NLRB 982, 986 (1994) (“The determination of successorship is made when the successor has begun normal operations with a substantial and representative complement of employees.”) (internal citations omitted); *Butera Finer Foods*, 296 NLRB 950, 953 (1989) (“A representative complement exists when the successor’s job classifications have been substantially filled and the successor is conducting normal or substantially normal operations.”).

²⁴ Aerotek performed two services for the Respondent. First, Aerotek screened applicants who were ultimately hired and employed directly by the Respondent. Second, Aerotek supplied the Respondent with hundreds of temporary employees who were paid by Aerotek and jointly supervised by the Respondent and seven onsite Aerotek supervisors. Voith contracted with Aerotek to supply both permanent and temporary employees well before it began normal operations with a substantial and representative complement.

²⁵ My colleagues note that Voith did not assert this defense. Voith did, however, except to the judge’s finding that it had a duty to bargain over the Aerotek subcontracting arrangement. The General Counsel, of course, bears the burden of proving all his unfair labor practice allegations, including that Voith violated Sec. 8(a)(5) by failing to give the Union notice and opportunity to bargain over the Aerotek subcontract-

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I disagree with the majority's finding that Voith's successor bargaining obligation attached *before* Voith began normal operations with a substantial and representative complement of unit employees. According to my colleagues, the successor bargaining obligation attached at some earlier, unspecified point in time when Voith hatched or began implementing its unlawful plan to discriminate against applicants formerly employed by the predecessor employer. Such a finding is contradicted by longstanding, well-established successorship principles that, for good reason, identify the precise point in time when a legal successor is required to recognize and bargain with the union. See, e.g., *Fall River Dyeing Corp. v. NLRB*, 482 U.S. at 52 (union recognition is "premature" if demanded before the successor has retained a "substantial and representative complement" of employees; "when a union has made a premature demand that has been rejected by the employer, this demand remains in force"; and the duty to recognize and bargain with the union does not attach "until the *moment* when the employer attains the substantial and representative complement") (internal quotations omitted; emphasis added).

Again, the majority here improperly commingles (i) bargaining doctrines under Section 8(a)(5) and (ii) non-discrimination principles under Section 8(a)(3). As explained above in part B, I would find that a successor's hiring discrimination yields its own backpay and hiring remedies—the standard relief for unlawful hiring discrimination in violation of Section 8(a)(3)—for applicants who were unlawfully denied employment; and I do not believe it is appropriate for the Board to effectively create and impose an additional "remedy" for the hiring discrimination by making the successor's setting of initial terms and conditions of employment a violation of Section 8(a)(5) and thus negating the Supreme Court's unequivocal holding in *Burns* that a successor has the right to set initial terms and conditions. For similar reasons, it is equally inappropriate for the Board to create and impose an additional "remedy" for Voith's hiring discrimination that completely disregards detailed and well-established principles approved and applied by the Supreme Court, establishing the precise "moment" when a predecessor's union may lawfully be recognized and engaged in bargaining by a successor employer. *Id.*²⁶

ing decision, and this burden requires the General Counsel to prove that Voith had an obligation to provide the Union notice and opportunity to bargain at the relevant time. Because Voith excepted to the judge's finding that it had a duty to bargain over the subcontracting decision, I find it appropriate to analyze whether the General Counsel has satisfied his burden of proving that a successorship bargaining obligation had attached before Voith decided to enter into the Aerotek subcontract.

²⁶ Although I disagree with the holding of *Love's Barbeque*, 245 NLRB at 82, that an employer that engages in discriminatory hiring in

Conclusion

Accordingly, as set forth above, I respectfully concur in part and dissent in part.

Dated, Washington, D.C. February 17, 2016

Philip A. Miscimarra,

Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT implement a plan to avoid hiring former employees of predecessor Auto Handling, Inc. or members of the Teamsters, and WE WILL NOT discriminate against or refuse to hire those individuals because of their concerted activities or Teamsters affiliation, or in order to avoid a successorship obligation to recognize and bargain with the Teamsters.

WE WILL NOT refuse, as a successor to Auto Handling, Inc., to recognize and bargain with the Teamsters as the

an effort to defeat legal successor status forfeits its *Burns* right to set initial terms and conditions of employment, I recognize that *Love's Barbeque* exists and that my colleagues, in following *Love's Barbeque*, adhere to that precedent. But nothing in *Love's Barbeque* or any other case supports my colleagues' finding that Voith's unlawful hiring discrimination permits the Board to disregard other black-letter successorship principles, which establish that Voith did not violate Sec. 8(a)(5) by declining to recognize and commence bargaining with the Union *before* Voith attained a substantial and representative complement of employees engaged in normal operations. In this regard, the majority is discarding decades of case law without any explanation in order to augment the standard remedies that exist for the violations at issue here. I believe this does violence to the Board's obligation to promote stability in the law and to refrain from ordering relief that is punitive rather than remedial.

representative of the employees at the Ford Motor Company, Louisville, Kentucky assembly plant performing vehicle processing including vehicle staging, shuttle and yard/inventory, and batch and hold work, concerning their terms and conditions of employment.

WE WILL NOT unilaterally set initial terms and conditions of employment for unit employees without first giving notice to and bargaining with the Teamsters about those changes.

WE WILL NOT unilaterally enter into a contract with Aerotek, Inc. to hire individuals other than former Auto Handling employees to perform bargaining unit work without notifying and bargaining with Teamsters.

WE WILL NOT render assistance and support to the UAW by allowing the UAW to meet with employees during orientation sessions and worktime in order to urge the employees to sign membership applications and checkoff authorizations.

WE WILL NOT assist, recognize and bargain with the UAW as the collective-bargaining representative of our employees who are employed by us at the Ford Motor Company, Louisville, Kentucky assembly plant, performing vehicle processing including staging, shuttle and yard/inventory, and batch and hold work, when the UAW did not represent an uncoerced majority of the unit employees or at a time before the commencement of our normal vehicle processing operations when we did not employ a representative segment of our ultimate vehicle processing employee complement.

WE WILL NOT tell applicants that if they are hired, they would have to become a member of the UAW.

WE WILL NOT inform applicants that in order to be hired, they would have to refrain from engaging in Section 7 activity such as striking.

WE WILL NOT threaten to discharge employees if they do not wear a safety vest bearing the UAW logo.

WE WILL NOT deny Teamsters Local 89 access to our employees while granting access to the UAW.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL recognize and, on request, bargain with Teamsters Local 89 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and if an understanding is reached, embody the understanding in a signed agreement:

All employees as set forth in Article 3 of the National Master Automobile Transporters Agreement, Central and Southern Area Supplemental Agreements and the Job Descriptions provisions of the Local Rider.

WE WILL notify Teamsters Local 89 in writing that we recognize it as the exclusive representative of our unit employees under Section 9(a) of the Act and that we will bargain with it concerning terms and conditions of employment for employees in the unit.

WE WILL, at the request of Teamsters Local 89, rescind any departures from terms and conditions of employment that existed immediately prior to our takeover of predecessor Auto Handling's operation, and WE WILL retroactively restore preexisting terms and conditions of employment, including wage rates and benefit plans, until we negotiate in good faith with Teamsters Local 89 to agreement or to impasse.

WE WILL make the unit employees whole for any losses caused by our failure to apply the terms and conditions of employment that existed immediately prior to our takeover of predecessor Auto Handling's operation.

WE WILL withdraw and withhold all recognition from the UAW and its Local 862 as the exclusive collective-bargaining representative of our vehicle processing employees unless and until the UAW has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

WE WILL, within 14 days from the date of the Board's Order, offer employment to the former unit employees of Auto Handling named in attachment A to the judge's decision as well as the other similarly situated employees on the Auto Handling seniority list, including those who did not file individual applications with us, and to any other Teamsters-affiliated applicants who filed applications with us and would have been hired by us but for our unlawful discrimination against them, in the positions previously held by Auto Handling employees or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any full-time or temporary employees hired in their place. Positions shall be offered to employees on the former Auto Handling seniority list in the order they appear on that list, followed by the other Teamsters-affiliated applicants according to the dates appearing on their applications. If there are insufficient positions available, the remaining employees shall be placed on a preferential hiring list.

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WE WILL make the employees referred to in the preceding paragraph whole for any loss of earnings and other benefits they may have suffered by reason of our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusals to hire the employees described above, and WE WILL, within 3 days thereafter, notify the affected employees in writing that this has been done and that the refusal to hire them will not be used against them in any way.

WE WILL compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL make whole any Teamsters-affiliated employees who were "belatedly hired" as a result of our discriminatory failure to timely hire them, for any loss of earnings and other benefits they may have suffered by reason of our unlawful refusal to timely hire them, plus interest.

WE WILL rescind our contract with Aerotek, Inc. to perform work which otherwise would have been performed by the employees on the Auto Handling seniority list or other Teamsters-affiliated applicants, and WE WILL offer any jobs created by this rescission to those employees.

WE WILL, within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which this notice, Appendix A, is to be read to the employees by a responsible management official or, at our option, by a Board agent in that official's presence. WE WILL also afford Teamsters Local 89, through the Regional Director, reasonable notice and opportunity to have a representative present when the notice is read to employees.

VOITH INDUSTRIAL SERVICES, INC.

The Board's decision can be found at www.nlrb.gov/case/09-CA-075496 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT accept assistance and support from Voith Industrial Services, Inc. in order to meet with employees to urge them to sign membership applications and checkoff authorizations.

WE WILL NOT obtain recognition from Voith Industrial Services, Inc. at a time that we do not represent an uncoerced majority in the unit and when Voith Industrial Services, Inc. has not started normal vehicle processing operations nor employed in the unit a representative segment of its ultimate vehicle processing employee complement.

WE WILL NOT accept recognition from Voith Industrial Services, Inc. unless we are certified by the National Labor Relations Board as the exclusive collective bargaining representative of our vehicle processing employees.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights listed above.

UNITED AUTOMOBILE AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA, AFL-CIO AND LOCAL 862

The Board's decision can be found at www.nlr.gov/case/09-CA-075496 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Eric A. Taylor, Esq., Jonathan D. Duffey, Esq., and Daniel Goode, Esq., for the Acting General Counsel.

Gary A. Marsack, Esq. and Stephen Richey, Esq., of Milwaukee, Wisconsin, and Cincinnati, Ohio, for Respondent Voith.

Michele Henry, Esq., Irwin H. Cutler, Esq., and William J. Karges, Esq., of Louisville, Kentucky, and Detroit Michigan, for Respondent UAW.

James F. Wallington, Esq. and Robert M. Colone, Esq., of Washington, D.C., and Louisville, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on August 21 through 24, August 27, 28, and 30, September 19 through 21, and October 1 through 3, 2012¹ in Louisville, Kentucky, pursuant to a Amended Second Consolidated Complaint and Notice of Hearing (the complaint) issued by the Regional Director for Region 9 of the National Labor Relations Board (the Board) on August 3. The complaint, based upon original and amended charges in the above-noted cases filed by General Drivers, Warehousemen & Helpers, Local Union 89, affiliated with the International Brotherhood of Teamsters (the Charging Party or the Teamsters), alleges that Voith Industrial Services, Inc. (Respondent Voith or Voith),² and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO and Local 862 (Respondent UAW or the UAW), has engaged in certain violations of Section 8(a)(1), (2), (3), and (5) and Section 8(b)(1)(A) of the National Labor Relations Act (the Act).

¹ All dates are in 2012, unless otherwise indicated.

² Voith was previously known as Premier Manufacturing Support Services. Premier purchased Voith around 2007 and changed its name to Voith in October 2010.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel (AGC), Respondent Voith, Respondent UAW, and a posthearing statement of the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Voith has been a corporation with an office and place of business in Louisville, Kentucky, and is engaged in the business of cleaning and providing transportation and logistic services to customers in the automobile manufacturing industry. During the past 12 months, Respondent Voith in conducting its business operations, purchased and received at its Louisville, Kentucky facility goods valued in excess of \$50,000 directly from points outside the Commonwealth of Kentucky. Respondent Voith admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Teamsters and the UAW are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background and Facts

Since October 2007, Voith has had a contract with Ford Motor Company (Ford) to provide cleaning and janitorial services at the Louisville Assembly Plant (the LAP). The UAW has represented Voith's cleaning employees since approximately 2008. The current National Collective-Bargaining agreement covering 16 Ford plants was effective October 3, 2008, to October 3, 2011, but has been extended by its terms and remains currently in effect (GC Exh. 84; R. Voith Exh. 2).

Since about January 31, Respondent Voith implemented a plan to hire approximately 84 employees in anticipation of entering into agreements with Ford that subsequently were executed on February 13 and March 1, respectively, to provide vehicle processing and inventory management services that were previously performed by Auto Handling, Inc., a wholly owned subsidiary of Jack Cooper Transport Company (Auto Handling).

Since about 1952, the Teamsters have been the designated exclusive collective-bargaining representative of the unit, and during that time the Teamsters were recognized as the representative by Auto Handling and its predecessors (GC Exh. 9). This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from June 1, 2011, to August 31, 2015. The employees of Respondent Voith, as set forth in article 3 of the National Master Automobile Transporters Agreement, Central and Southern Area Supplemental Agreements and the job descriptions provisions of the Local Rider (NMATA), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

By letter dated February 14, Charging Party President Fred Zuckerman informed Voith that the Teamsters are the exclusive collective-bargaining representative of bargaining unit employees recognized under the NMATA covering employees of Auto Handling at the LAP. Zuckerman further stated that the Team-

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sters have represented the employees working at the LAP in the vehicle loading and distribution classifications for a succession of employers to Ford for more than 60 years. Attached to the letter were the names and contact information for more than 165 skilled employees and members of the Charging Party who possess many years of experience performing work at the LAP. Zuckerman noted that he had learned through industry sources that Voith has been awarded a contract with Ford to provide services identical to the operations historically performed at the LAP by NMATA bargaining unit employees of Auto Handling. In addition, he demanded entry access to meet and communicate with any prospective employee or newly-hired employees being assigned to the LAP operations (GC Exh. 6).

On or about February 22, Respondent Voith granted recognition to Respondent UAW as the exclusive collective-bargaining representative of the unit (GC Exhs. 31 and 32).

By letter dated April 9, Voith informed International UAW Representative George Palmer that effective immediately it was maintaining a "neutrality policy" and that Voith was withdrawing its February 22 recognition of the UAW as the bargaining representative of the LAP vehicle processing employees because such recognition was granted prematurely (GC Exh. 17).

Between April 9 and May 1, Voith commenced normal operations at the LAP under its contracts with Ford.

By letter dated April 10 to Voith's director of labor relations, Erwin Gebhardt, Zuckerman demanded that Voith recognize and bargain with the Teamsters in an appropriate bargaining unit of Voith vehicle processing employees at the LAP (GC Exh. 18). He noted that the employees have designated the Teamsters as the exclusive collective-bargaining representative of bargaining unit employees of Auto Handling as evidenced by the seniority lists and timely employment applications that were previously provided.

By letter dated April 18 to Gebhardt, Zuckerman renewed the Teamsters demand for recognition and bargaining, and further requested equal access at the LAP to meet with bargaining unit employees (GC Exh. 49).

On or about May 1, pursuant to a card check that was verified by an independent third party, Voith granted recognition to Respondent UAW (R. Voith Exh. 43).

B. Agency Allegations

The AGC alleges in paragraph 6 of the complaint that since March 1, to the present, Aerotek, Inc. (Aerotek) has been an agent of Respondent Voith for purposes of hiring employees within the meaning of Section 2(13) of the Act.

Sarah Curry Martinez, an account manager at Aerotek, testified that on March 1, she met with Voith's peoples services manager, Timothy Bauer, who requested that Aerotek supply full-time permanent and temporary employees at the LAP to augment their work force under its recently acquired vehicle processing contract with Ford. Bauer's request for manpower was made pursuant to the current existing National Services Agreement between Aerotek and Voith (GC Exh. 81).³ During

the meeting, Bauer provided a box of applications that Voith had received for vehicle processing positions at the LAP (GC Exhs. 13 and 16).

In accordance with the existing Agreement, and continuing from early March 2012 to the present time, Aerotek has screened applications submitted by prospective applicants including former Auto Handling employees, conducted interviews of applicants at Aerotek's offices, and completed a suitability analysis as to each applicant it recommended to Voith for a vehicle processing position at the LAP (GC Exh. 77).

Martinez confirmed that Aerotek has referred to Voith approximately 11 full-time permanent vehicle processing employees who are Teamster members and up to 300 temporary employees who are presently working at the LAP on two shifts. Approximately 8 to 10 of the temporary employees have been converted into permanent employees; however, temporary employees with a Teamster affiliation have not been converted to permanent status. While Aerotek prepares and issues the paychecks for the 300 temporary employees, they are jointly supervised by Voith and seven on-site Aerotek supervisors.

Based on the forgoing, I find that Aerotek is an agent for the purposes of hiring Voith employees within the meaning of Section 2(13) of the Act. *Diehl Equipment Co.*, 297 NLRB 504, 504 fn. 2 (1989).

C. The 8(a)(1) Allegations

(a) The AGC alleges in paragraph 15 of the complaint that about March 5, Respondent Voith, by Bauer, during an employment interview at the offices of Aerotek, told an employee that if the employee was hired the employee would have to become a member of Respondent UAW.

Facts

Tiffany Byers testified that she received a Voith employment application from UAW District Committeeman Dennis Skaggs and during a Teamster union meeting on February 12. Subsequently, both applications were submitted to Voith.

On March 3, Byers received a telephone call from Aerotek recruiter Megan Carter inquiring whether she was interested in working for \$11 per hour at the LAP (GC Exh. 45). Carter further informed Byers that if she was interested in the position she should be present on March 5 at Aerotek's offices for an interview. Byers went to Aerotek's offices on March 5, and interviewed with recruiter Steve Shelbourne who informed her that the vehicle processing position for which she applied would be a UAW job. Shortly after her meeting with Shelbourne, Byers interviewed with Bauer. After describing the job, Bauer confirmed that the position would be a UAW job and did Byers have a problem with it.

Gregory Johnson submitted a Voith application to Aerotek and was directed to appear for an interview on March 5. He met with Bauer on that date and during the course of the interview Bauer informed Johnson that the bargaining agent for the vehicle processing position for which he applied was the UAW.

Both Byers and Johnson, who previously worked at the LAP performing vehicle processing responsibilities, are members of the Charging Party. On April 10, they commenced permanent employment with Voith.

³ Respondent Voith did not inform the Teamsters concerning the contract with Aerotek nor did it engage in bargaining with respect to this conduct or the effects of this conduct.

Discussion

By letter dated February 22, Gebhardt stated that the UAW has demonstrated majority status (through a card check) for the vehicle processing work at the LAP (R. Voith Exh. 40). That statement was incorrect for the following reasons. First, while the card check conducted on February 22 examined each new employee's signature with Voith's employee sign-in sheet and the 50 submitted UAW applications for membership and check-off authorization cards (R. Voith Exh. 39), those cards were executed by employees who applied for and were hired solely for janitorial and cleaning positions. On February 20, the newly hired janitorial employees attended an orientation at the LAP conducted by Voith's facilities manager, Doug Couch, and were exclusively trained on subjects related to their janitorial and cleaning duties. Second, while Couch inquired at the orientation whether the newly hired employees were interested in hourly openings for vehicle processing positions, it was not until mid-March 2012 that approximately 25 of the janitorial and cleaning employees were transferred to vehicle processing positions.⁴ Accordingly, when Bauer made the statement on March 5 that applicants for vehicle processing positions would have to become members of the UAW and inquired whether the employees had a problem with this, such statements are inherently coercive for a number of reasons. First, as found below, the 50 authorization cards executed by the janitorial employees were obtained by UAW representatives using coercive methods, and therefore were tainted. Second, at the time the authorization cards were solicited on February 20 none of the newly hired employees were performing vehicle processing duties, and therefore the UAW did not represent an uncoerced majority of the unit. Third, pursuant to my finding that the authorization cards were obtained through coercion, there was no exclusive collective-bargaining representative for any vehicle processing employees on February 22.

For all of the above reasons, I find that when Bauer made the statement alleged in paragraph 15 of the complaint, it was an intrusion on employee's Section 7 rights and violated Section 8(a)(1) of the Act.

(b) The AGC alleges in paragraphs 22(a) and (b) of the complaint that Respondent Voith, by Sarah Curry Martinez, on or about April 9 informed an employee that he would only be hired if he promised to refrain from engaging in lawful Section 7 activity, and that other members of the Teamsters would be hired if she did not fear that they would engage in lawful Section 7 activity.

Facts and Discussion

Wayne Grether, a former employee of Auto Handling and a Teamster member, learned in early April 2012 that Aerotek was seeking applicants to serve as temporary employees for Voith. Grether contacted Martinez by telephone who confirmed that she was recruiting personnel to work at the LAP in the classification of temporary vehicle processing positions for up to 6

weeks of employment.⁵ Grether filled out paperwork at Aerotek and subsequently took a drug and personality test.

During their telephone conversation, Grether testified that Martinez told him that he would only be hired if he promised to refrain from striking, and that other members of the Teamsters could be hired if she did not fear that they would engage in strike activity. Martinez denied the statements attributed to her by Grether.

Grether, who ultimately decided to accept other permanent employment and did not reply to several voice mail messages left by Aerotek representatives offering him a temporary position with Voith at the LAP, was precise and direct in his testimony. He did not exhibit mannerisms as one who manufactured such testimony, especially noting the specificity in describing Martinez' responses. Martinez, who initially denied in her testimony that she did not exclude former Auto Handling employees from the screening process for employment with Voith, had to grudgingly admit that she did engage in such conduct (GC Exh. 102). Under these circumstances, I am inclined to credit Grether and find that Martinez made the statements attributed to her in the complaint.

Based on the foregoing, and particularly noting my finding that Aerotek is an agent of Respondent Voith, I find the statements made by Aerotek's account manager, Martinez, are violative of Section 8(a)(1) of the Act. *Albertson's, Inc.*, 344 NLRB 1172 (2005).

(c) The AGC alleges in paragraph 16 of the complaint that on April 10, Respondent Voith by Facilities Manager Doug Couch during an orientation session told an employee that new hires were represented by the UAW and would receive UAW health insurance.

Facts

Patti Murphy, who previously worked for Auto Handling and is a Teamster member, submitted Voith employment applications to the UAW, Teamsters, and Aerotek.

Murphy interviewed at Aerotek in late March 2012 with Couch, and successfully passed the personality/behavior, drug, and physical tests. She was hired by Voith and reported for work on April 10 to attend an orientation conducted by Couch. Murphy testified that during the orientation Couch informed the newly hired permanent employees that the UAW would be their bargaining representative and they would receive UAW insurance. Couch denied that he made the statements attributed to him by Murphy. He asserts that since Voith provides insurance to its employees pursuant to the janitorial and cleaning collective-bargaining agreement between Voith and the UAW, the testimony of Murphy that new hires would receive UAW insurance is incorrect.

⁵ Martinez confirmed in her testimony that she is an accounts manager for Aerotek, and has the authority to hire, fire, discipline, and makes work assignments to the two recruiters on her team that she directly supervises. Martinez, since March 1, was designated by Aerotek to manage the Voith account for the hiring of full-time and temporary employees at the LAP. Accordingly, I find that Martinez is a supervisor within the meaning of Sec. 2(11) of the Act and an agent of Respondent Voith within the meaning of Sec. 2(13) of the Act.

⁴ By memorandum dated February 13, Couch informed the incumbent Voith janitorial and booth paint cleaning employees of job openings for vehicle processing positions and set a deadline for those employees to sign a posting (R. Voith Exh. 31).

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Discussion

As found below, the showing of interest obtained by the UAW on February 20-22 was tainted, and therefore Voith's February 22 grant of recognition to the UAW was null and void. Moreover, on April 9, Voith withdrew its recognition due to the fact that Voith had not commenced normal business operations and did not employ in the unit a representative segment of its ultimate employee complement (GC Exh. 17).

I note that only one other employee was called to testify by the AGC, other than Murphy, to support the allegation in paragraph 16 of the complaint.⁶ Indeed, record evidence establishes that 20-30 employees attended the April 10 orientation meeting conducted by Couch. I am circumspect of Murphy's testimony for two reasons. First, Respondent Voith withdrew its recognition of the UAW the day before the April 10 orientation. Second, Voith rather than the UAW provides insurance to its employees under the existing janitorial collective-bargaining agreement between it and the UAW (R. Voith Exh. 2). Thus, I am hard pressed to credit Murphy's testimony particularly noting that the UAW was not the employee's collective-bargaining representative on April 10, and incumbent Voith employees do not receive UAW life or health insurance.

Based on these circumstances, I find that Couch did not make the statement on April 10 that new hires were represented by the UAW and would receive UAW insurance. Therefore, I recommend that paragraph 16 of the complaint be dismissed.

(d) The AGC alleges in paragraph 21(a) of the complaint that Regional Manager Bret Griffin, on May 31, threatened to discharge employees if they did not wear a Voith/UAW safety vest.

Facts

On May 31, in a meeting with a number of full-time Voith employees, Griffin informed the participants that they would be required to wear new safety vests that displayed a Voith/UAW logo on the front of the vest. Voith employee Brenda Helm objected to wearing such a vest pointing out that she is a Teamster member and preferred to wear her old safety vest that she had been wearing since her hiring in April 2012. Griffin replied, "You will go home, if you do not wear the vest." Coworkers Kelly Stein and Brenda Swift both testified that they heard Griffin make those remarks to Helm. Employee Patti Murphy, who also attended the May 31 meeting, testified that she heard Griffin state to Helm that if you do not wear the safety vest with the Voith/UAW logo you will be violating a direct order and will not be allowed to work. All of the employees who attended the May 31 meeting ultimately signed for the new safety vests and wore them during the remainder of the workday.

On June 1, under 24 hours from the 1:30 p.m. meeting on May 31, Griffin informed the employees that he was retracting the directive to wear the Voith/UAW safety vests. The Teamster members including Stein, Swift, Murphy, and Helm removed their Voith/UAW safety vests and no longer wore them

at any time after June 1. Some employees, however, voluntarily continued to wear the safety vests with the Voith/UAW logo.

Discussion

Based on the above recitation and the credible testimony of the above employees, I find that Griffin's statement to Helm was inherently coercive. Additionally, since Voith's recognition of the UAW on May 1 was null and void as discussed below, and in the absence of a duly constituted exclusive collective-bargaining representative on May 31, the requirement to wear safety vests with the Voith/UAW logo is violative of the Act.

However, considering the particular circumstances of this allegation, I find that Voith, by Griffin, within 24 hours of the requirement to wear the safety vests and making the coercive statement to Helm, cured the violation by no longer requiring the employees to wear the Voith/UAW safety vests. Moreover, Helm was not disciplined nor sent home that day. Further support for this finding is confirmed by the former Auto Handling employees and Teamster members testifying (Swift, Sandra Rhodes, Stein, Murphy, Helm, and Adam Schott) that they continue to wear Teamster T-shirts while at work without retaliation by Voith. Thus, I find no evidence of discrimination against these employees because of their Teamster affiliation and wearing such clothing. Moreover, since June 1, no Voith employee has been required to wear a safety vest with the Voith/UAW logo nor have any threats or coercive remarks been directed at these employees. See *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) (such repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct).

Accordingly and particularly noting that the *Passavant* requirements were followed, I do not find that Respondent Voith violated Section 8(a)(1) of the Act as alleged in paragraph 21(a) of the complaint.

(e) The AGC alleges in paragraph 21(b) of the complaint that on June 1, Brett Griffin instructed employees in a staff meeting to report other employees' union activities.

Facts and Discussion

Employee Deborah Cheatham testified that on June 1, Griffin came into an ongoing meeting around 11 a.m. and informed the employees that he had recently received a telephone call from a representative of the NLRB. The representative informed Griffin that the Board had made a decision that Voith had an obligation to recognize the Teamsters as the exclusive collective-bargaining representative of the vehicle processing employees. Griffin stated that no one was going to tell him who would represent Voith employees but if the participants in the meeting had any questions they should call the NLRB. He concluded his remarks by telling the employees that in his experience there had to be a secret-ballot vote conducted by the Board to determine the bargaining representative at an employer and that if anybody approached the employees about a union, and you feel uncomfortable, please let him know.

In direct questions by Respondent Voith's counsel and me regarding the statement attributed to Griffin in paragraph 21(b) of the complaint, employees Cheatham, Gregory Johnson, and Rhodes all denied that Griffin instructed employees at the staff

⁶ The AGC called Aaron Schott as a witness, who also attended the April 10 orientation, but elicited no testimony about the Couch statement alleged in par. 16 of the complaint.

meeting to report other employees' union activities. Moreover, I credit Griffin's testimony that he followed a script with detailed talking points that he prepared in advance of the meeting. Those talking points make no reference to reporting other employees' union activities (R. Voith Exh. 47).

Under these circumstances, I find that the AGC did not establish that Griffin made the statement attributed to him. Thus, I recommend that paragraph 21(b) of the complaint be dismissed.

(f) The AGC alleges in paragraph 21(c) of the complaint that Brett Griffin, on June 1, denied Teamsters access to employees' while extending access to Respondent UAW.

Facts

Teamster Vice President Avral Thompson testified that he received a telephone call from one of his members who had attended a meeting at Voith on June 1 in which he alleged being harassed. Additionally, the member informed Thompson that Griffin had informed employees that he had received a telephone call from the NLRB that they intended to issue a complaint seeking that the Teamsters be certified as the exclusive collective-bargaining representative of the Voith employees.

Based on the conversation with the Teamster member, Thompson and Zuckerman went to the LAP in an effort to seek equal access and to meet with Voith employees. After waiting at the entrance having made the request to a Voith employee, Griffin arrived and engaged in a dialogue with Thompson and Zuckerman. Griffin informed the Teamster representatives that since they were not the exclusive collective-bargaining representative of Voith's vehicle processing employees, he would not permit them to come into the building to meet with Voith employees. Voith Supervisor Jason Wilson, who was present during the discussion between the Teamster representatives and Griffin, confirmed the events in question.

Discussion

Based on my below finding that the May 1 grant of recognition to the UAW was null and void, I find that in the absence of an exclusive collective-bargaining representative on June 1, it was unlawful for Voith to grant the UAW access to its employees while denying access to the Teamsters.

Therefore, I find that when Voith, by Griffin, denied access to the Teamsters on June 1, it violated Section 8(a)(1) of the Act.

D. The 8(a)(1) and (2) Allegations

(a) The AGC alleges in paragraph 13 of the complaint that about February 20, Respondent Voith rendered assistance and support to Respondent UAW by allowing the UAW to meet with its employees during their orientation in order to urge the employees to sign membership applications and checkoff authorizations.

Facts

Teresa Ceesay was hired by Voith to perform housekeeping duties in February 2012. She attended an orientation with other newly hired housekeeping/janitorial employees on February 20 at the LAP. At the lunchbreak, the employees were escorted to

the cafeteria by Voith supervisors but the supervisors did not go inside. Once entering the cafeteria, the employees were approached by several UAW representatives and Ceesay signed a UAW authorization card.

Ceesay worked for approximately 2 weeks when she was approached by an individual wearing a Voith shirt who informed her that it would be necessary to drive vehicles. She further testified that all of her coworkers who were hired solely to perform housekeeping or janitorial duties were told that if you did not sign up to drive cars you might not have a job. Ceesay, who did not want to drive vehicles, submitted her resignation to Voith.

Keith Robinson applied for a cleaning/janitorial position with Voith and interviewed with Couch in early February 2012. He commenced work on February 17 as a janitor and was told by Couch that he could advance to a driver position if one became available.

Robinson, along with 30 to 40 other employees, attended an orientation on February 20 that was conducted by Couch. During the orientation session, Couch informed the newly hired janitors that there was an opportunity to become drivers and if anyone was interested they should sign a list that would be distributed.

Voith supervisors escorted the employees to the cafeteria for lunch but they did not go inside. Upon arriving in the cafeteria, Robinson was approached by several UAW representatives who informed him if he wanted to join the Union he was free to do so. Robinson signed a UAW authorization card on February 20, and observed a UAW representative witness his signature.

Shortly after February 20, Robinson took a physical to qualify for a driver position. He was unable to pass the physical, and was permitted to return to his janitorial duties. Presently, he remains a full-time Voith employee in the janitorial bargaining unit.

Cody Jagers interviewed for a janitorial position with Voith on February 17, and attended an orientation with approximately 30-40 employees on February 20 at the LAP run by Couch. Just prior to the lunchbreak, Couch informed the newly hired janitorial employees that they would be meeting with representatives of the UAW in the cafeteria, and you need to talk with them before filling out cards. Couch further stated, according to Jagers, that he along with other Voith supervisors would escort the employees to the cafeteria but they were not permitted to be present when the employees talked with the UAW representatives.

When Jagers entered the cafeteria, he along with the other employees, were approached by a number of UAW representatives who were wearing shirts with the UAW logo. The lead UAW representative informed the employees that you do not have to join or sign an authorization card but if you don't sign you might not have a job.⁷ Jagers signed a UAW authorization

⁷ On cross-examination, counsel for Respondent Voith established that Jagers did not include the statements attributed to the UAW representative in his pretrial affidavit. Jagers responded that the Board agent who took his statement did not ask questions as to what the UAW representative said in the cafeteria. I fully credit Jagers' testimony as he impressed me as a sincere witness whose testimony had a ring of

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tion card and observed that all of his fellow coworkers that attended the orientation also signed UAW authorization cards. After completing the lunchbreak, the employees returned to the orientation session.

During the afternoon orientation, Couch distributed a list for employees to sign if they were interested in driving vehicles. Jagers signed the list and took a physical exam but did not pass. Voith then terminated his employment after 3 days on the job.

On February 17, Reginald Farrell was hired as a janitor for Voith. He attended, on February 20, along with the other newly hired janitors and cleaning personnel an orientation at the LAP conducted by Couch. Just before the lunchbreak, Couch informed the employees that they would be meeting with UAW representatives in the cafeteria. Voith supervisors escorted the employees to the cafeteria but they did not go inside.

Upon entering the cafeteria, Farrell was approached by several UAW representatives who were wearing shirts with the UAW logo. One of the UAW representatives stated to the employees that you do not have to join or sign an authorization card but if you don't sign you might not have a job. Farrell testified that he felt pressured signing the UAW card, and also observed other employees signing membership authorization cards.

Approximately 4-6 weeks after Farrell commenced work, Couch informed him that he would be considered for a driving position. Farrell replied that he did not want to drive vehicles. Couch said you have to take the physical to start driving vehicles since we do not have anybody out there, and if you do not take the driving test you will not have a job. Farrell took the driving test and after passing was trained for 1 week on the requirements of the position. He drove and shuttled vehicles for 5-7 days until a family situation prevented him from continuing his driving duties and he was permitted to return to his janitorial position. Farrell performed his janitorial duties for a short time until he became allergic to the paint and cleaning chemicals he was working with. Farrell briefly returned to performing janitorial functions until he was laid off on May 16 due to performance deficiencies.

Respondent UAW Union Steward Sharita Blackmon, who attended the February 20 orientation as an incumbent Voith janitorial employee, testified that she rather than Couch escorted the employees to the cafeteria for their lunchbreak, and that she sent a text message to UAW LAP Building Chairman Steve Stone that the employees would be on their lunchbreak in the main cafeteria. Couch testified that while he did not personally escort the employees to the cafeteria, several of the supervisors and incumbent janitorial employees were requested to do so. Couch denied that he informed the employees during the orientation that UAW representatives would be in the cafeteria and the employees should meet and talk with them.

truth to it and was fully consistent with the testimony of coworker Farrell who attended the orientation and was present in the cafeteria.

Discussion

I find that the AGC has conclusively established the allegations alleged in paragraph 13 of the complaint for the following reasons.

First, the weight of the evidence establishes that Respondent Voith, by Couch, had knowledge that the UAW representatives would be present in the cafeteria to meet with the newly hired janitorial and housekeeping employees to urge them to sign membership applications and checkoff authorizations. Indeed, the testimony of the above-noted employees has a ring of truth to it particularly noting that they testified that Couch stated that they should meet and talk with the UAW representatives in the cafeteria but Voith supervisors could not be present when this occurred. I therefore conclude that the meeting in the cafeteria was prearranged between Respondent Voith and Respondent UAW for the sole purpose of permitting Respondent UAW representatives to urge employees to sign membership applications and checkoff authorizations.

Second, I find the statements made by the UAW representatives to the employees, that you do not have to join or sign a union card but if you don't sign you might not have a job to be inherently coercive. Thus, I find that those statements taint the validity of each authorization card signed on February 20.⁸

Third, it is apparent to me that Respondent Voith forced a number of the janitorial and housekeeping employees to undertake driving duties or suffer the loss of their jobs. I find such actions, in using untrained and inexperienced janitorial and housekeeping employees to perform driving responsibilities, to be inherently discriminatory with the obvious intent of excluding or limiting the hiring of former Auto Handling employees and members of the Teamsters who previously performed the vehicle processing responsibilities at the LAP.

Lastly, in an email dated February 21, Voith Regional Manager Elam Barnett requested Couch to make sure that 11 Voith employees resign UAW membership cards (GC Exh. 100). Such instructions clearly establish that Voith was aware that membership cards were executed by its employees on February 20, and conclusively establishes that Voith rendered assistance and support to Respondent UAW. Indeed, it substantiates the credible testimony provided by the above-noted employees who attended the February 20 orientation.

For all of these reasons, I find that Respondent Voith violated Section 8(a)(1) and (2) of the Act as alleged in paragraph 13 of the complaint.⁹

(b) The AGC alleges in paragraph 17 of the complaint that about April 11, Respondent Voith, by Services Line Manager for Vehicle Processing Dennis Frank, rendered assistance and support to Respondent UAW to meet with its employees during

⁸ Record evidence establishes that 39 of 50 authorization cards were signed on February 20, and were witnessed by UAW Representatives Stone, Mike Parker, and Jeffrey Hale (GC Exh. 111). Stone was the only witness who testified for Respondent UAW regarding the execution of authorization cards on that date.

⁹ While the authorization cards were signed during nonworktime (lunchbreak), the factors set forth in *Midwestern Personnel Services*, 331 NLRB 348, 353 (2000), when considering the record evidence convinces me that Voith provided assistance and support to the UAW.

worktime in order to urge them to sign membership applications and checkoff authorizations.¹⁰

Kelly Stein testified that she previously worked for Auto Handling prior to being laid off in December 2010 when the LAP shut down for retooling. As a Teamster member, and an employee of Auto Handling, she regularly drove vehicles on and off site, loaded vehicles on rail cars, and scanned vehicles for inventory purposes.

In February 2012, Stein learned that Auto Handling lost the contract with Ford at the LAP. She obtained several Voith employment applications while attending a Teamster meeting on February 12, and after completing them filed an application with the UAW (GC Exh. 39) and another with Aerotek (GC Exh. 48).

Stein interviewed at Aerotek on March 5 with former Auto Handling Supervisor Miller who is presently a manager with Voith, and ultimately was hired. She reported to work and attended an orientation on April 11 conducted by Couch. After watching safety videos for the majority of the day, Couch took the approximately 15–20 newly hired employees to the LAP yard, and introduced them to Voith Supervisors Frank and Miller. Frank informed the employees that someone wants to talk with them, and he and the other supervisors separated themselves from the group and walked approximately 20–50 feet away.

Within several minutes, an individual in a motorized cart approached the group of employees and introduced himself as Ted Hunt, a UAW representative. He told the employees that this is UAW work and our yard. UAW Shop Steward Blackmon arrived in the yard and assisted Hunt in distributing UAW authorization cards to the employees. Hunt informed the group of employees that you have to sign these cards or you will not work here.

Stein further testified that the work she previously performed for Auto Handling at the LAP is identical to the work she presently performs for Voith. Presently, Stein works side by side with temporary Voith employees who perform the same work as Voith permanent employees with the exception of loading vehicles on rail cars.¹¹

Brenda Swift, a Teamster member and former Auto Handling employee, interviewed with Miller in early April 2012 at Aerotek and was hired by Voith shortly thereafter. Swift reported to work on April 11 and attended an orientation with 15–20 newly hired employees that was conducted by Couch. After

watching safety videos the majority of the day, Couch escorted the employees to the LAP yard and introduced them to Voith Supervisors Frank and Miller. According to Swift, she heard Frank mention to the supervisors that they had a situation and they immediately separated from the group standing about 20–50 feet away. Within a few minutes, UAW Representative Hunt accompanied later by Shop Steward Blackmon arrived and Hunt told the employees that they needed to sign UAW authorization cards. Although Swift declined to sign a UAW authorization card, she observed seven employees in the group that signed them.

Deborah Cheatham, a Teamster member and former Auto Handling employee, interviewed with Miller in early April 2012 at Aerotek and was hired by Voith shortly thereafter. Cheatham reported to work on April 11, and attended an orientation. In the afternoon, Frank and Miller drove the employees to the LAP yard (GC Exh. 55). Shortly after arriving in the yard, Cheatham heard Frank state that we have a situation here and the supervisors separated from the group of employees remaining about 25–50 feet away. Within a few minutes, UAW Representative Hunt and Shop Steward Blackmon approached the employees and Hunt said the Teamsters are trying to get people to sign up. This is a one shop yard with the UAW. He pulled out UAW authorization cards and asked the employees whether they wanted to sign them. Hunt further stated if you sign the cards, the better it would be for you. While Cheatham declined to sign a UAW authorization card, she observed four–six coworkers in the group that signed the cards.

Sandra Rhodes, a Teamster member and former Auto Handling employee, interviewed at Aerotek for a vehicle processing position for Voith in early April 2012. She was ultimately hired by Voith and reported for work on April 11. Rhodes attended an orientation on that day with approximately 15–20 newly hired employees including coworkers Stein, Swift, Flanagan, and Cheatham. After watching safety videos in the morning, the employees were escorted to the LAP yard and met with Voith Supervisor Frank. Shortly thereafter, UAW Representative Hunt arrived and demanded that the employees sign UAW authorization cards. While Rhodes declined to sign the authorization card, she observed several coworkers sign the cards while leaning on the motorized vehicle that Hunt used to arrive in the yard.

James Flanagan, a Teamster member and former Auto Handling employee, interviewed at Aerotek for a position with Voith and commenced work on April 11. He attended an orientation on that day along with coworkers Stein, Swift, and Cheatham that was conducted by Frank.¹² During the afternoon, Frank escorted the employees to the yard and shortly after they arrived UAW Representative Hunt arrived and briefly spoke with Frank who informed the employees that the UAW representative has something to say to them. Frank and

¹⁰ While not specifically alleged in the complaint, record evidence establishes that in a meeting held with Voith employees in the breakroom on April 11, UAW Representatives Hunt, Blackmon, and Stone solicited authorization cards from 23 employees' at a time that recognition had been withdrawn by Voith (GC Exh. 111). Indeed, Hunt testified that Stone called him on the telephone and instructed him to proceed to the breakroom to solicit Voith employees to sign UAW authorization cards. Thus, such actions in addition to denying access to the Teamsters for the same purpose in light of the withdrawal of recognition by Voith, violates Sec. 8(a)(1) and (2) of the Act.

¹¹ Permanent employees Swift, Rhodes, Cheatham, and Flanagan all testified consistently with Stein that the work at the LAP that they previously performed while employed at Auto Handling is identical to the work they presently perform for Voith.

¹² Flanagan stated that Couch introduced a Voith secretary during the orientation that passed out a UAW Fact Sheet that explained the history of the organization and its accomplishments (GC Exh. 56). Helm testified similarly and received the same Fact Sheet in a packet of materials at her April 10 orientation session.

the other supervisors separated themselves from the employees and stood approximately 20-50 feet away. Hunt then approached the employees and said they had to sign union authorization cards right away. He also stated to the 17-18 employees that the Teamsters were trouble makers. Shop Steward Blackmon arrived and distributed UAW authorization cards to the employees. Flanagan observed Frank pointing to the former Auto Handling employees and mouthing the words, "They are Teamsters."

Aaron Schott, a Teamster member, interviewed with Bauer at Aerotek in March 2012, and ultimately was hired by Voith. He attended an orientation on April 10.

On April 11, Schott was assigned along with approximately 15 coworkers to perform cleanup work in the yard. While he was working, two individuals appeared on a motorized vehicle and introduced themselves as UAW Representatives Stone and Barry Ford. Stone said, "We are from the UAW and we want you to sign an authorization card." Schott declined to sign the card but observed other coworkers sign the cards that were then collected by Stone.

Discussion

I find that the AGC has conclusively established the allegations alleged in paragraph 17 of the complaint. In this regard, six Voith employees testified credibly and consistently that Couch along with other Voith supervisors escorted the employees who attended the April 11 orientation to the LAP yard. Couch then introduced the employees to Frank and two other supervisors (Tom Baker and Scott Board) who would be conducting additional training in the yard. Within a few minutes, UAW Representative Hunt arrived along with Shop Steward Blackmon and distributed UAW authorization cards. Hunt made intimidating statements to the Voith employees such as this is UAW work and our yard. He further demanded that the employees sign the authorization cards or you will not work here, and if you sign the cards the better it would be for you because the Teamsters are trouble makers. Flanagan testified, without contradiction, that he observed Frank pointing toward the former Auto Handling employees and mouthed the words "They are Teamsters."

Frank's testimony was disjointed, argumentative, and beyond belief.¹³ In this regard, he denied talking to Hunt and represented that he did not observe either Hunt or Blackmon arrive in the yard or that he had ever met either of these individuals before. His testimony was contradicted by fellow Supervisors Baker and Board who both testified that they along with Frank witnessed the arrival of Hunt and Blackmon in the yard and observed the UAW representatives engaging in discussions with the employees. Baker also confirmed that he knew who Blackmon was and that Frank had recently been introduced to her. Significantly, Hunt's testimony contradicted Frank. In this regard, Hunt testified that he approached Frank immediately upon arriving in the yard on his motorized vehicle, and they briefly conversed about whether he could meet with the employees. All of the employee's testimony noted above

comports with this sequence of events and it is reasonable to conclude that after Hunt spoke with Frank, the supervisors separated from the group and Hunt met with the employees.

I conclude, based on the above evidence, that Respondent Voith established a prearranged time with the UAW representatives to meet with the employees' in the yard. It was no coincidence that Hunt and Blackmon arrived in the yard to meet with the employees during the middle of the afternoon as the employees were approximately a mile from their training indoor classroom. The record further establishes that the UAW representatives met with the employees for the sole purpose of urging the employees to sign UAW authorization cards and checkoff forms. I also find that the authorization cards that the UAW obtained on April 11 were tainted by the assistance and support rendered by Respondent Voith and the coercive/threatening remarks and methods used by UAW Representative Hunt in soliciting and obtaining signatures from employees in a pressured atmosphere.

Accordingly, I find the AGC has sustained the allegations in paragraph 17 of the complaint, and therefore, determine that Respondent Voith violated Section 8(a)(1) and (2) of the Act.

(c) The AGC alleges in paragraph 18 of the complaint that about April 16, Respondent Voith, by Tom Baker and Dennis Frank, rendered assistance and support to Respondent UAW by allowing Respondent UAW to meet with Respondent Voith's employees during worktime in order to urge its employees to sign membership applications.

Facts

The AGC presented three witnesses to support the allegation alleged above. Murphy, Cheatham, and Helm testified that they were working off-site on April 16, and were informed by Baker that he was driving them to the breakroom in order to attend a meeting. Upon arriving late at the meeting location, the employees observed that UAW Representative Stone was addressing their coworkers. They all testified that they heard Stone inform the employees that the Teamsters had filed unfair labor practice charges with the NLRB concerning who represented the yard employees but it could take years for this to be resolved. Additionally, Stone stated that the UAW would be the collective-bargaining representative in the yard, and we will get everyone signed up soon. Shortly after Stone finished his presentation, Frank came into the breakroom and said it was time for the employees to go back to work.

Baker, while admitting that he drove the above employees to the breakroom on April 16, asserted that it was for the sole purpose of permitting them to attend there afternoon break rather than to attend a required meeting.

Discussion

It strains credulity to believe that Baker drove the employees to the breakroom solely to have lunch when upon arriving there were 25-30 employees presently in the breakroom listening to a presentation delivered by Stone and other UAW representatives. I find, as testified to by Murphy, Cheatham, and Helm, that Baker informed them that a meeting was being held in the breakroom and their presence was required. Likewise, I credit the employees' testimony that they were not on a designated break when the meeting occurred specifically noting that before

¹³ On cross-examination, the AGC established numerous inconsistencies between Frank's record testimony and statements previously provided in his pretrial affidavit.

arriving at the breakroom from working off-site, Baker permitted them to take their regular scheduled break. I further note that prior to April 16, Respondent Voith had withdrawn recognition from the UAW, and any meeting that was held either on work or breaktime with UAW representatives was a breach of their neutrality pledge. Thus, requiring the attendance of employees on April 16 at a time that there was no exclusive collective-bargaining representative representing the employees, and denying the same access to the Teamsters is violative of the Act.

Under these circumstances, and particularly noting that Respondent Voith required the employees to be in the breakroom while UAW representatives made a presentation, such actions are tantamount to rendering assistance and support to the UAW and therefore violates Section 8(a)(1) and (2) of the Act.¹⁴

E. The 8(a)(3) and (5) Violations

1. Successorship allegations

The AGC alleges in paragraph 3 of the complaint that Respondent Voith has operated the prior business of Auto Handling in basically unchanged form and but for its illegal conduct in violation of the Act would have employed as a majority of its employees individuals represented by the Teamsters. Under those circumstances the AGC asserts that Voith is a successor to Auto Handling.

Facts

The Charging Party is the exclusive collective-bargaining representative of bargaining unit employees recognized under the NMATA who work at the Ford LAP (GC Exhs. 2 and 3). They have represented these employees at the facility in the vehicle loading and distribution classifications for a succession of employers operating as vendors to Ford for approximately 60 years (GC Exh. 9).

Between 2008 and December 2010, Auto Handling was the employer that operated as a vendor to Ford and performed the vehicle processing responsibilities at the LAP. Auto Handling recognized the Charging Party as the exclusive collective-bargaining representative of the unit within the meaning of Section 9(a) of the Act.

The agreement between Auto Handling and Ford terminated in October 2010, and Ford concurrently announced that it intended to shut down the LAP for retooling in anticipation of producing a new Ford Escape model. Between October and December 2010 the Auto Handling employees were gradually laid off for lack of work (R. Voith Exh. 24).

Around September 2011, Ford issued an invitation to interested vendors to bid and submit quotes for vehicle processing and car hauling work that it planned to reinstitute once the LAP reopened. Four companies including Auto Handling and Voith submitted quotes to Ford and a bid meeting took place on October 6, 2011, that was attended by the four companies and a

UAW representative.¹⁵ The Charging Party was not invited to participate in the meeting.

On February 10, Zuckerman and Thompson traveled to Detroit, Michigan, to meet with high-level Ford representatives. During the course of the meeting, the Teamster representatives were informed that the vehicle processing work at the LAP has been awarded to Respondent Voith rather than Auto Handling. According to the Ford representative, the decision to award the bid to Voith primarily centered on their ability to perform the work at a savings of between \$7-\$8 million in comparison to the bid submitted by Auto Handling. The Ford representative stated that Voith would be awarded the initial contract on February 13, and the employees would be represented by the UAW.

On February 12, the Charging Party conducted a meeting attended by approximately 200 members and informed those in attendance that Respondent Voith had been awarded the LAP vehicle processing work rather than their former employer Auto Handling. Thompson distributed Voith employment applications to the membership and requested the members to return the completed applications so he could submit them to Voith and the UAW.

By letter dated February 14, Zuckerman informed Voith that it was his understanding that the proposed operations at the LAP will be identical to the operations historically performed at that location by NMATA bargaining unit employees of Auto Handling and similar predecessor employers. Zuckerman demanded that Voith notify the Charging Party and the 165 skilled yard employees on the list attached to his letter of all hiring opportunities for the staffing of projected operations at the LAP (GC Exh. 6).

By letter dated April 10, Zuckerman demanded that Voith recognize and bargain with the Charging Party in an appropriate bargaining unit of Voith employees performing vehicle processing duties at the LAP. Zuckerman pointed out that to date Voith has refused to hire or consider for hire the Auto Handling bargaining unit employees that were identified on the seniority and address list that was provided as an attachment to his prior letter dated February 14 (GC Exh. 18).

The record evidence establishes that Voith commenced the hiring of janitorial and cleaning personnel in early to mid-February 2012 in anticipation of getting the LAP facility ready to fulfill its contractual responsibilities effective in April 2012.

Credible testimony was provided by former employees of Auto Handling that the vehicle processing work performed by them for Voith is identical to the work performed while they worked for Auto Handling at the LAP. Indeed, the record establishes that four former supervisors of Auto Handling were hired by Voith when they commenced operations at the LAP (Steve Tingle, Jason Miller, Dennis Frank, and Caleb Williams). Testimony was also elicited that Voith hired 11 former Auto Handling employees in April 2012, with 10 of these employees still being employed as of August 2012.

¹⁴ While the AGC's proffered witnesses to this allegation did not confirm that authorization cards or checkoff authorizations were solicited by UAW representatives during the meeting, nevertheless, I find that the actions of Respondent Voith as described above constitute rendering assistance and support to the UAW within the meaning of Sec. 8(a)(1) and (2) of the Act.

¹⁵ The collective-bargaining agreement between Ford and the UAW permits such participation (R. UAW Exh. 1).

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Discussion

A successor employer is obliged to bargain with the union of its employees if "the bargaining unit remains unchanged and a majority of employees hired by the new employer were represented by a recently certified bargaining agent." *NLRB v. Burns Security Services*, 406 U.S. 272, 281 (1972). Elaborating on this principle, the Board has explained that there must be both "continuity in the workforce" and "continuity of the business enterprise" to trigger the obligations of a successor. E.g., *Marine Spill Response Corp.*, 348 NLRB 1282, 1285 (2006).

With respect to continuity of the business enterprise, the Supreme Court prescribes a totality of the circumstances test. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). The Board considers "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." *Id.*

Continuity in the work force is established if a majority of the successor's employees were employed by the predecessor. *Id.* at 41. The Board, with the approval of the Courts, gauges the union's majority status at the time when a "substantial and representative complement" of employees has been hired. *Grane Healthcare Co.*, 357 NLRB 1412 (2011) (citing *Fall River*, 482 U.S. at 49 (quoting *Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 628 (9th Cir. 1983))). It also looks at "the size of the complement on the[e] date and the time expected to elapse before a substantially larger complement would be at work . . . as well as the relative certainty of the employer's expected expansion." *Id.* (quoting *Premium Foods*, 709 F.2d at 628).

In assembling its work force, a successor "may not refuse to hire the predecessor's employees solely because they were represented by a union or to avoid having to recognize a union." *U.S. Marine Corp.*, 293 NLRB 669, 670 (1989), *enfd.* 944 F.2d 1305 (7th Cir. 1991). In judging discrimination by a successor, the Board uses the familiar *Wright Line* test. *Planned Building Services, Inc.*, 347 NLRB 670 (2006) (citing *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981)). The General Counsel carries the initial burden of establishing that the successor failed to hire employees of its predecessor and was motivated by antiunion animus. *Id.* at 673. The burden then shifts to the employer to show that it would not have hired the predecessor's employees even in the absence of an unlawful motive.

In the *Wright Line* context, the General Counsel demonstrates antiunion animus by establishing three elements. As the Board explained in *Kentucky River Medical Center*, 356 NLRB 6 (2010), "The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer." Animus and discrimination may be inferred from the circumstances and need not be established

directly. E.g., *Sunshine Piping, Inc.*, 351 NLRB 1371, 1390 (2007). In addition, the Board approves the use of the following factors to establish an unlawful refusal to hire:

[S]ubstantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine. [*Planned Bldg.*, 347 NLRB at 673 (alteration in original) (quoting *U.S. Marine*, 293 NLRB at 670).]

If an employer is found to have discriminated in hiring, the Board assumes that, but for the unlawful discrimination, the successor would have hired the predecessor employees in their unit positions. *Id.* at 674 (citing *Love's Barbeque Rest. No. 62*, 245 NLRB 78, 82 (1979), *enfd.* in relevant part sub nom. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981)). More to the point, it also assumes that the union would have retained its majority status. E.g., *GFS Bldg. Maintenance, Inc.*, 330 NLRB 747, 752 (2000) (citing *State Distributing Co.*, 282 NLRB 1048 (1987)). Consequently, if in the meantime the employer has refused to recognize and bargain with the union, it will be held to have violated Section 8(a)(1) and (5) of the Act. *Id.* Under these circumstances, the successor is also disqualified from setting initial terms and conditions of employment. *Massey Energy Co.*, 354 NLRB 687 (2009) (citing *Love's Barbeque*, 245 NLRB at 82).

Assuming *arguendo* that the factors for successorship are present, the subject case presents the situation that a majority of former Auto Handling employees were not hired by Voith. The Board has held that successorship will be found in such circumstances if the new owner fails to hire the predecessor's employees because of their affiliation with the union. *Love's Barbeque Restaurant No. 62*, 245 NLRB 78 (1979). Thus, the central question herein is whether Respondent Voith refused to hire a majority of the former employees of Auto Handling for anti-union reasons.

I find that a substantial number of factors exist for finding that Voith is a successor to Auto Handling. For example, Voith conducted essentially the same business at the same location as Auto Handling and the majority of the newly constituted bargaining unit employees would have consisted of former employees of the predecessor, absent Voith's unlawful discrimination. Further, it is well settled that successorship will be found in such circumstances if the new owner fails to hire the predecessor's employees because of their affiliation with a labor organization.

Respondent Voith argues that in order to meet the contractual staffing requirements under its contracts with Ford it filled the 50 initial vehicle processing positions with then current employees. It contends that the employees were transferred to vehicle processing positions, and were employed under the terms and provisions of the collective-bargaining agreement between Voith and Respondent UAW covering the janitorial employees at the LAP (R. Voith Exh. 2).

Voith's asserted basis for not hiring the former Auto Handling employees, while alleged to be nondiscriminatory proved otherwise. For example, it is noted that due to the anticipated opening of the LAP in early 2012, Voith found it necessary to increase its janitorial staffing as only a small contingent of cleaning personnel remained employed during the 2010-2011 shutdown period of the LAP. For this purpose, an increase in recruitment for janitorial positions occurred, and on or about February 17, approximately 40-50 cleaning personnel were hired. During the interview process, the successfully hired employees were specifically informed by Couch that they were solely being considered for janitorial positions. The newly hired employees reported to the LAP and attended an orientation on February 20, in which they reviewed safety videos and were only trained on the duties and responsibilities of their janitorial positions.

Record evidence shows, however, that Voith classified the janitorial employees effective February 20 as vehicle processing employees with a designation code of 2031 (R. Voith Exh. 53). That classification code conflicts with official payroll records that show the janitorial employees, who were transferred to vehicle processing positions, were being paid under a 937 janitorial code, and continued to be paid under that code long after February 20 (GC Exh. 23). The conflict, as described above, is consistent with record testimony that the newly hired janitorial employees were not assigned nor did they engage in vehicle processing duties on February 20.¹⁶ Indeed, a number of these employees testified that they were approached by Voith supervisors in late February and early March 2012, and were informed that they would be required to perform driving duties. If the employees refused, the supervisors informed them they would not have a job.

Based on the above, I find that Respondent Voith deliberately utilized janitorial employees, all of whom had no previous experience in driving vehicles or loading rail cars at the LAP, to exclude or limit the hiring of former Auto Handling employees on or after February 17.

Additional evidence to support this finding is established by the following factors. First, it is noted that Respondent Voith by letter dated October 21, 2011, before it was awarded the contracts to perform work at the LAP, informed Ford that it had a national contract with the UAW for all related sites and if awarded the LAP contracts, the hourly employees would be represented by the UAW (R. Voith Exh. 11). Second, while Martinez testified that she did not eliminate any former Auto Handling employees from the screening process, record evidence proves otherwise. Indeed, in an email communication between Martinez and Bauer, Aerotek determined to eliminate from consideration well over 100 former Auto Handling employees who had previously performed vehicle processing work (GC Exh. 102). Bauer, at no time, repudiated the decision to

exclude or limit the hiring of the former Auto Handling employees. Record evidence confirms, although Voith hired 11 former Auto Handling employees in April 2012 (R. Voith Exh. 57), the number represents only a small fraction of the permanent full-time complement of 72 employees on board during mid-April and early May 2012 (R. Voith Exh. 62(b) - (q)). Third, Respondent Voith did not provide to Aerotek the seniority list of former Auto Handling employees attached to the Charging Party's February 14 request to hire the experienced and well-trained former employees who had performed the identical work at the LAP nor did it respond to the letter (GC Exhs. 6 and 7). Fourth, Voith did not request Aerotek, until March 1, to begin the process of recruiting for vehicle processing positions, and Couch, by email dated February 28 was still considering employees for janitorial positions (GC Exh. 77).

Under these circumstances, it is apparent that but for Respondent Voith's unlawful conduct set forth above, the Teamsters status as the exclusive collective-bargaining representative would have survived Respondent Voith's assumption of the vehicle processing work at the LAP. I find, therefore, that Respondent Voith has violated Section 8(a)(1) and (5) of the Act. *Mammoth Coal Co.*, 358 NLRB 1643 (2012).

2. Refusal to hire or consider for hire allegations

Respondent Voith denies that it has refused to hire or consider for hire the former employees of Auto Handling due to their union affiliation or for discriminatory reasons.

To support this defense, Respondent Voith presented a timeline commencing with its execution of the February 13 contract with Ford, and the requirements to launch and perform the contractual provisions between March 12 and 20 (R. Voith Exh. 37). To this end, they assert that while they received the initial batch of applications from former Auto Handling employees on February 14, the time necessary to source the applications, conduct interviews, complete drug, background, behavioral assessment, and physical abilities tests, in addition to completing mandatory vehicle processing training, did not permit them to meet the launch and performance deadlines. Therefore, Voith argues that lawful business necessity rather than discriminatory motivation prevented the hiring of the former Auto Handling employees.

I reject this argument for the following reasons. First, Couch testified that it was not until mid-March 2012 when 25 of the janitorial and cleaning personnel were transferred to perform vehicle processing duties, and a week or more of training was required to familiarize these employees with vehicle processing responsibilities. Second, by email dated March 27, Voith Regional Manager Elam Barnett noted that the launch date had been pushed back to April 9, and only a small number of employees would be needed to drive vehicles to the off-site storage yards to hold until Ford gets the okay to ship the vehicles (GC Exh. 103). Barnett further stated that it will be necessary to increase production over the next several weeks and approximately 75 full-time employees should be sufficient to get us through the first 30 days of the project.

Accordingly, based on Couch and Barnett's pronouncements, it is readily apparent that if Respondent Voith had com-

¹⁶ Respondent UAW Shop Steward Blackmon, as an incumbent janitorial employee, applied for a vehicle processing position on February 13 (R. Voith Exh. 31). Blackmon testified that she did not officially commence vehicle processing duties until mid-March 2012, and continued to work the day shift in her janitorial classification as of April 11. Likewise, it is noted that Blackmon continued to be paid under janitorial code 937 beyond March 2012 (GC Exh. 23).

menced the process of sourcing and completing the required tests to complete the hiring process shortly after the February 14 receipt of the Teamster applications, the former employees of Auto Handling could have been hired. Moreover, record evidence confirms that the former Auto Handling employees had the requisite experience and previously performed the identical vehicle processing work. Thus, with little or no training, they could have been ready to meet the required launch and performance dates specifically noting that initially only a small number of employees would be needed to perform contractual requirements. In making this finding, I specifically note that the hiring and screening process conducted by Aerotek for former Auto Handling employees Byers, Johnson, and Schott was completed in 37 days, for Murphy in 16 days, and during a 10-day period for Swift, Cheatham, and Rhodes. Such evidence completely undermines the timeline defense proffered by Voith.

Record evidence confirms that Voith was clearly aware of the union affiliation of the predecessors' employees. It is also clear that Voith did not want to recognize the Teamsters as it feared the economic package that they would demand knowing that it would far exceed the wage rate presently paid to its incumbent UAW represented janitorial employees. Additionally, as found above, Voith engaged in 8(a)(1) conduct, rendered assistance and support to the UAW, and denied access to the Charging Party to meet with its employees while granting access to the UAW. All of these factors support a finding of discrimination that establishes Voith's motives in not hiring the former Auto Handling employees. *New Concepts Solutions, LLC*, 349 NLRB 1136 (2007).

Based on the foregoing, I find that Respondent Voith established a hiring procedure designed to exclude or limit the hiring and consider for hiring the former Auto Handling employees who were members of the Charging Party in violation of Section 8(a)(1) and (3) of the Act. *Custom Leather Designers, Inc.*, 314 NLRB 413, 418 (1994) (The effect of not hiring former represented employees was to deny the union any possible majority status in its complement of employees).

3. Refusal to bargain allegations

The AGC alleges in paragraph 12 of the complaint that Respondent Voith has failed and refused to recognize and bargain in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act and unilaterally established initial terms and conditions of employment. Additionally, Respondent Voith without notice or bargaining with the Teamsters unilaterally contracted with Aerotek, Inc. to perform bargaining unit work.

The evidence establishes that Voith's assumption of the vehicle processing and inventory management services work at the LAP did not occasion a change in the yard work done or the manner in which it was accomplished. Indeed, Voith hired a number of former Auto Handling supervisors to perform the same duties and responsibilities at the LAP that they previously performed as employees of Auto Handling.

Based on the above recitation, I find that Respondent Voith violated Section 8(a)(1) and (5) of the Act when it refused to recognize and bargain with the Charging Party and unilaterally

established initial terms and conditions of employment for employees in the unit. Here, any uncertainty as to what Respondent Voith would have done absent its unlawful conduct must be resolved against them. In these circumstances, I find that Respondent Voith would have hired the former Auto Handling employees but for their union affiliation. Therefore, it was not entitled to set initial terms of employment without first bargaining with the Charging Party about the conduct and the effects of the conduct. *Mammoth Coal Co.*, 354 NLRB 687 (2009).

I also find that when Respondent entered into a contract with Aerotek to hire individuals other than the former Auto Handling employees to perform bargaining unit work, it did so without notifying and bargaining with the Charging Party. Therefore, it further violated Section 8(a)(1) and (5) of the Act.

F. The 8(b)(1)(A) Violations¹⁷

The AGC alleges in paragraph 19 of the complaint that about February 20, April 11 and 16, Respondent UAW received assistance and support from Respondent Voith which allowed Respondent UAW to meet with Respondent Voith's employees in order to urge them to sign membership applications and checkoff authorizations.

The AGC further alleges in paragraph 20 of the complaint that about February 20 and May 1, Respondent UAW obtained recognition from Respondent Voith as the exclusive collective-bargaining representative of the unit even though they did not represent an uncoerced majority of the unit, and on February 20, Respondent Voith had not started normal business operations and did not employ in the unit a representative segment of its ultimate employee complement.

The AGC argues, in support of the above allegations, that when recognition was granted on February 22 and May 1, the UAW did not have a valid majority because the authorization cards that were solicited were coerced by unlawful conduct, and the February recognition was improper because Respondent Voith had not commenced normal business operations nor did they employ in the unit a representative segment of its ultimate employee complement.

The record establishes that between February 20 and 22, a total of 50 authorization cards were solicited by the UAW and signed by employees of Respondent Voith. Specifically, 39 authorization cards were signed on February 20, 9 were signed between February 21 and 22, and 2 authorization cards were illegible (GC Exh. 111).

¹⁷ Respondent UAW argues that the International Union should not be held responsible for allegations alleged in pars. 19 and 20 of the complaint. I reject this argument for the following reasons. First, Respondent UAW did not raise this defense in its answer (GC Exh. 1(LL)), and it is noted that the answer refers to the International and its Local 862 as "collectively union." Second, exhibits in the record establish Voith's continuing discussions with International UAW representatives concerning the recognition of the UAW as the bargaining representative of the Voith vehicle processing employees (see GC Exhs. 31 and 41; R. Exhs. 38, 40, and 41). Third, the existing collective-bargaining agreement between Voith and the UAW (GC Exh. 84; R. Exh. 2) is with the International UAW and covered the posting requirement for incumbent Voith janitorial employees to bid for vehicle processing positions (GC Exhs. 29, 30; R. Exh. 31).

As I found above in my discussion regarding paragraph 13 of the complaint, the statements of UAW representatives in the cafeteria on February 20 were coercive. Indeed, informing employees that if they did not execute an authorization card it could impact their job leaves employees between a rock and a hard place. It thus establishes that the 39 employees who signed authorization cards on February 20 were pressured to do so, and therefore, the resulting majority status was invalid because it was coerced by the UAW's unlawful conduct. *Fountainview Care Center*, 317 NLRB 1286, 1289 (1995) (recognition based on cards tainted by coercion establishes there was not an uncoerced majority).

Likewise, the evidence is overwhelming that on February 20, Respondent Voith had not commenced normal business operations. Indeed, many employees testified, in a mutually corroborative way, that normal production had not commenced on February 20. It is apparent that the employees attending the orientation were hired for and were being instructed regarding their duties associated with janitorial and cleaning responsibilities. On February 20, there was no finished Ford product moving off the assembly lines, and therefore, no vehicle processing or inventory management services work was being performed by Voith employees. Rather, during the month of February 2012 only cleaning and janitorial responsibilities were ongoing with some vehicle processing training occurring later in the month for a small group of employees. Indeed, the evidence shows that Bauer did not request Aerotek to commence the recruitment of vehicle processing positions until March 1.

Although the above finding that Voith was not engaged in normal business operations on February 20-22 would alone establish a violation, the evidence also shows that the employee complement at the LAP fell far short of a substantial and representative complement. In this regard, it is noted that the new employee's attending the orientation on February 20 were exclusively hired to perform janitorial and cleaning responsibilities. It was not until on or about May 1 that Voith reached its vehicle processing permanent full-time complement of 72 required to fulfill the terms of the contracts it executed with Ford on February 13 and March 1. Indeed, this was recognized by Voith when it withdrew its previous grant of recognition to the UAW on April 9 (GC Exh. 17; R. Voith Exh. 41).

As it concerns the recognition obtained on May 1, I also find that the showing of interest was coercively obtained and the authorization cards were tainted because of unlawful UAW conduct. In this regard, as discussed above, I found that the 39 authorization cards signed on February 20 were coercively obtained. By letter dated April 10, the UAW informed Voith employees that while recognition has been withdrawn on April 9, we still have those authorization cards that were signed in February 2012, and intend to use them to help prove majority status when Voith reaches its normal business operations (GC Exh. 40). The evidence shows that 23 authorization cards were obtained on April 11. An additional six authorization cards were signed on April 10, 17, 18, 19, and 20, however, no evidence was presented addressing the circumstances on where and how those cards were executed. With respect to the cards obtained on April 11, of the 23 cards signed on that date, 17 were solicited by Hunt. As I found above regarding the discus-

sion in paragraph 17 of the complaint, the solicitation by Hunt of those authorization cards was obtained under coercive conditions. Therefore, when combining the 39 authorization cards obtained under coercive conditions on February 20 with the additional 17 tainted cards on April 11, I find that 56 authorization cards must be excluded from a valid majority. The record confirms that Voith's full-time permanent complement of vehicle processing employees reached 72 on or about May 1, after Voith commenced normal business operations at the LAP. By that time, Voith had transferred at least 25 of the janitorial and cleaning employees, some of whom as discussed above were coercively forced to do so, to vehicle processing positions. It is also noted that included in the complement of 72 were 11 former Auto Handling employees and members of the Teamsters who declined to execute UAW authorization cards. Therefore, of the remaining 61 employees that executed UAW authorization cards, at least 56 of those cards were obtained by coercive methods and tainted the overall majority. Even if you only consider the 39 authorization cards obtained on February 20 that were used to support the May 1 grant of recognition, there still is not a valid majority.¹⁸

Accordingly, I find that on February 22 and on May 1, when recognition was granted to Respondent UAW, it was not valid because it was coerced by the UAW's unlawful conduct, and since they did not represent an uncoerced majority, Section 8(b)(1)(A) of the Act was violated. Additionally, I find that by demanding and accepting recognition on February 22, at a time that Voith was not engaged in normal business operations and did not employ in the unit a representative segment of its ultimate employee complement, the UAW also violated Section 8(b)(1)(A) of the Act. *Hilton Inn Albany*, 270 NLRB 1364, 1365 (1984), citing *Herman Bros. Inc.*, 264 NLRB 439 (1982).

G. Respondent Voith's Affirmative Defenses

Respondent Voith argues that it is not a successor employer to Auto Handling based on a number of reasons that it articulated during the course of the subject hearing.

First, Voith argues that the car hauling operations at the LAP ended in October 2010 with the termination of the contract between Ford and Auto Handling.

While this assertion is technically correct, the issue presented for consideration is whether after Voith was awarded the contracts to manage the vehicle processing and inventory management services at the LAP, it was violative of the Act for Voith not to have hired the former employees of Auto Handling to perform the identical work. As found above, Voith violated the Act by its refusal to recognize and bargain with the Charging Party and not hire the former employees of Auto Handling.

Second, Voith asserts that Auto Handling prior to the LAP shutdown performed the car hauling work in its entirety. Since March 2012, when the car hauling work was reestablished, it

¹⁸ GC Exh. 111 represents that 21 authorization cards signed on February 20 were used to support the second grant of recognition on May 1. Even if this number is used combined with the 17 authorization cards solicited by Hunt on April 11, the result would be the same as the UAW did not represent an uncoerced majority on May 1 (38 tainted cards in a unit of 72).

has been parsed and now there are six contractors performing the work.

Voith's argument attempts to lump the functions that were created in 2012 as car hauling to the exclusion of the traditional yard work that has been performed on a continuing basis at the LAP for over 60 years. It is the yard work that the AGC and the Charging Party argue should continue to be performed by the former Auto Handling employees under the February 13 contract between Voith and Ford.

The evidence establishes that after March 2012, when the LAP was reopened,¹⁹ Ford utilized a new Renaissance distribution lot that previously did not exist in 2008–2010 that is located approximately 3 miles south of the LAP. Ford, in 2012, also uses a lot in Shelbyville, Kentucky, as an off load rail location. Prior to the shutdown of the LAP in 2010, Auto Handling performed the entire car hauling work from the portal of the LAP and the KTP to the ultimate dealer. After the reopening of the LAP, the car hauling work has been awarded to six independent contractors who each handle a portion of the workload.²⁰ The Charging Party represents the drivers employed by Allied Trucking,²¹ RCS Inc., and Cooper Transport but another Teamsters local represents the Cassens drivers. AWC performs inventory management at the Renaissance lot, using a sophisticated soft ware program, and employs two individuals who are not represented by any labor organization. Prior to the shutdown in December 2010, Allied Trucking, RCS, and Cooper Transport did not come to the LAP to perform car hauling responsibilities. After March 2012, RCS swaps vehicles between the LAP and the KTP, and drives vehicles from the KTP to the Shelbyville lot. They also drive single units from the Renaissance lot to the Shelbyville lot, a distance of approximately 33 miles, and load the vehicles on rail cars.²² Cooper Transport performs car hauling and shuttle work at the Renaissance lot and is responsible for placing vehicles driven to the lot by employees of Voith on car hauling trucks for delivery to the ultimate dealers. Since March 2012, the above employers have operated exclusively from the Renaissance lot performing car hauling responsibilities. Since April 2012, Voith drives vehicles from the LAP to the Renaissance lot and loads them on rail cars. Auto Handling did the same type of rail loading work prior to the shutdown but the lot was on the LAP premises approximately 50–100 yards away from the staging area that stores the finished vehicles.

The record evidence is clear that the work being sought by the Charging Party is the same work as was previously performed at the LAP prior to the shutdown in December 2010.²³

¹⁹ The KTP did not close for retooling and remained open for all material times manufacturing trucks.

²⁰ The car hauling work is performed by Voith, Cassens Trucking, Allied Motors, RCS Inc., AWC, and Cooper Transport.

²¹ Allied performs 70 percent and Cooper Transport 30 percent of the car hauling work from the Renaissance lot.

²² RCS also drives single units from the LAP to the Shelbyville lot but of the 55 jobs promised by Ford only 16 have materialized.

²³ Voith's argument that there was no reasonable expectation of rehiring the former Auto Handling employees due to the lengthy hiatus between the shutdown and reopening of the LAP is rejected. In this regard, the significance of a hiatus is whether it impacts the employees'

Indeed, the complaint allegations do not seek the car hauling work that is performed by other independent contractors as described above.

Therefore, I find that Voith has continued the employing entity in basically unchanged form and is the successor to Auto Handling for the yard work it presently performs at the LAP facility.

Respondent Voith additionally asserts that the vehicle processing work under its contract with Ford constitutes an accretion to the existing janitorial bargaining unit established under the terms of the collective-bargaining agreement between it and the UAW (R. Voith Exh. 2; GC Exh. 84). It further argues that the collective-bargaining agreements at other Ford locations intended to extend and did extend to the vehicle processing performed by it at the LAP. It also argues that it extended recognition to the UAW on May 1 based on a card check which obligates it to recognize and bargain with the UAW.

The Board follows a restrictive policy in finding accretion because it forecloses the employees' basic rights to select their own bargaining representative. *Towne Ford Sales*, 270 NLRB 311 (1984); *Melbet Jewelry Co.*, 180 NLRB 107 (1970).

Accretion is not applicable to situations in which the group sought to be accreted would constitute a separate appropriate bargaining unit. *Passavant Retirement & Health Center*, 313 NLRB 1216 (1994). The Board will find a valid accretion when the extended recognition involves employees who have little or no separate group identity and when the additional employees share an overwhelming community of interest with the pre-existing unit. *Super Valu Stores*, 283 NLRB 134, 136, (1987); *Safeway Stores*, 256 NLRB 918 (1981).

The Board when considering the appropriateness of accreting employees into an established bargaining unit evaluates the following factors: "the integration of operations, centralization of managerial and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control over labor relations, collective-bargaining history and interchange of employees." *TRT Telecommunications Corp.*, 230 NLRB 139, 141 (1977).

Applying the above principles leads me to conclude that the yard work that was previously performed by the former employees of Auto Handling is not an appropriate accretion to the existing janitorial unit contained in the collective-bargaining agreement between Voith and the UAW. In this regard, the working conditions, skills and functions, and bargaining history and interchange of employees are not found when comparing the work history of the two units. For example, when the former employees of Auto Handling performed the yard work prior to the shutdown and the janitorial unit existed at the LAP, there was little or no interchange of personnel and the skills and functions of both job descriptions are completely different. When Voith was awarded the contract in February 2012 to perform the yard work, the evidence establishes that the janito-

expectations of rehire. Record evidence confirms that prior to Voith's assumption of the yard work the successor companies at the LAP routinely hired the predecessor's employees and recognized the Charging Party. In similar circumstances, the Board has found violations of the Act. *Tree-Free Fiber Co.*, 328 NLRB 389 (1999).

rial employees did not have the requisite skills or experience to perform the vehicle processing duties. Moreover, the employees were presented with the choice of accepting the driving responsibilities or losing their jobs. Therefore, I reject the arguments advanced by Respondent Voith that the yard work its current employees perform is an accretion to the existing janitorial bargaining unit contained in its collective-bargaining agreement with the UAW.²⁴ Further support for this finding is Respondent UAW's determination on February 20 that the janitorial collective-bargaining agreement and the vehicle processing work are independent entities of each other, and therefore, it was decided not to include the vehicle processing work in the janitorial collective-bargaining agreement (GC Exh. 72).²⁵

Likewise, I reject the other arguments advanced by Voith regarding the appropriateness of the unit. First, as I previously found the showing of interest presented to Voith on May 1 was tainted and therefore is null and void. Thus, on that date, there was no legitimate collective-bargaining representative of the Voith employees. Additionally, relying on one collective-bargaining agreement in a Michigan Ford plant (MAP) to require the yard work to be extended to the UAW at the LAP is misplaced (R. Voith Exh. 6). In fact, the MAP agreement specifically covers haul away services rather than yard work. Likewise, the UAW has separate contracts for the janitorial and vehicle processing work at the MAP, and the vehicle processing work was not acquired until January 2011. Voith's argument that any new work that it obtains at any existing Ford facility where they operate is included under its janitorial national collective-bargaining agreement based on the phrase "work of a continuous nature" is unfounded. Record evidence shows that janitorial and cleaning work is not of a continuous nature when compared to the intricate and hazardous yard work performed at the LAP. This is evident based on the existence of separate collective-bargaining agreements at the LAP for janitorial and vehicle processing duties since at least 2008, and the rejection of this position by the UAW (GC Exh. 72).²⁶ Likewise, arguments advanced with respect to collective-bargaining agreements at a Springhill General Motors plant that once included car hauling and rail loading work in the parties' 2005-2008 collective-bargaining agreement (R. Voith Exh. 4) that subsequently was removed from the successor 2008-2011 agreement (R. Voith Exh. 3) is also unavailing. Lastly, the reliance on a single Arbitration Award concerning the eligibility of laid-off employees for holiday pay and benefits to support the appropriateness of extending recognition in the subject

²⁴ Gebhardt testified that Voith is not applying all the terms of the UAW janitorial collective-bargaining agreement (R. Voith Exh. 2) to the yard employees working at the LAP.

²⁵ As noted in Respondent Voith's posthearing brief, the Board limited the application of *Giano* where the work does not constitute an accretion. *Coca-Cola Bottling Co. of Buffalo, Inc.*, 325 NLRB 312 (1998).

²⁶ Voith's reliance on the contractual "after-acquired provision" was first raised in its answer and during the course of the hearing. This defense, as admitted by Gebhardt, was not presented to the AGC during the course of the investigation nor prior to the issuance of the subject complaint.

case is misplaced (R. Voith Exh. 5). Moreover, a single award of an Arbitrator is not binding on Board proceedings.

Accordingly, based on my findings above, the former employees of Auto Handling were not hired by Voith because of their union affiliation and to avoid recognizing and bargaining with the Teamsters.

CONCLUSIONS OF LAW

1. Respondent Voith is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Teamsters and Respondent UAW are labor organizations within the meaning of Section 2(5) of the Act.
3. The following employees' constitutes a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

All employees as set forth in Article 3 of the National Master Automobile Transporters Agreement, Central and Southern Area Supplemental Agreements and the Job Descriptions provisions of the Local Rider.

4. Respondent Voith engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act when in an employment interview on March 5, 2012, at the offices of Aerotek, Inc., they told an employee that if the employee was hired the employee would have to become a member of the UAW. Additionally, Respondent Voith violated Section 8(a)(1) of the Act when its agent at Aerotek informed an employee that in order to be hired he would have to refrain from engaging in Section 7 activity and by denying Teamsters Local 89 access to its employees while granting access to the UAW.

5. Respondent Voith engaged in unfair labor practices within the meaning of Section 8(a)(1) and (2) of the Act by rendering assistance and support to Respondent UAW by allowing the UAW to meet with its employees during orientation sessions and work time in order to urge the employees to sign membership applications and checkoff authorizations. Additionally, Respondent Voith granted recognition to Respondent UAW even though the UAW did not represent an uncoerced majority of the unit and at a time prior to the commencement of its normal business operations when it did not employ in the unit a representative segment of its ultimate employee complement.

6. Respondent Voith engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by implementing a plan to hire 84 employees with the intention of excluding the hiring of applicants who were former employees of Auto Handling or members of the Teamsters because they engaged in concerted activities or in order to avoid an obligation to recognize and bargain with the Teamsters.

7. Respondent Voith is a successor to Auto Handling, Inc. with respect to the obligation to recognize and bargain with the Teamsters representing employees in the above unit, and therefore violated Section 8(a)(1) and (5) of the Act by its refusal to do so.

8. Respondent UAW engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act by receiving assistance and support from Respondent Voith which allowed the UAW to meet with its employees in order to urge the employees to sign membership applications and checkoff authoriza-

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tions. Additionally, Respondent UAW obtained recognition from Respondent Voith even though they did not represent an uncoerced majority in the unit and at a time Respondent Voith had not started normal business operations nor employed in the unit a representative segment of its ultimate employee complement.

REMEDY

Having found that Respondent Voith and Respondent UAW have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent Voith discriminatorily refused to hire the former Auto Handling unit employees, I recommend that Voith be ordered to immediately offer to the individuals listed in attachment A employment in the positions for which they would have been hired, absent Respondent Voith's unlawful discrimination, or if those positions no longer exist, to substantial equivalent positions, discharging if necessary any employees hired to fill those positions. The employees listed in attachment A shall be made whole for any loss of earnings they may have suffered due to the discrimination against them. The backpay is to be calculated in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons*, 283 NLRB 1173 (1987). In accordance with *Kentucky River Medical Center*, 356 NLRB 6 (2010), backpay and/or monetary awards shall be paid with interest compounded on a daily basis.

Having found that Respondent Voith unlawfully refused to bargain collectively with the Teamsters, I shall also recommend that Voith be ordered to recognize and bargain with the Teamsters concerning wages, hours, benefits, and other terms and conditions of employment of bargaining unit employees, upon request by the Teamsters. In addition, and in order to remedy Respondent Voith's unlawful unilateral changes to wages, benefits, and terms and conditions of employment that went into effect when they began to employ individuals to perform unit work on April 9, 2012, I shall recommend that Respondent Voith be ordered to rescind the unilateral changes and make the employees whole by remitting all wages and benefits that would have been paid absent Voith's unlawful conduct, until Respondent Voith negotiates in good faith with the Teamsters to agreement or to impasse, subject to Respondent Voith's demonstration in a compliance hearing that had lawful bargaining taken place, less favorable terms than had existed under Auto Handling would have been lawfully imposed. *Planned Building Services*, 347 NLRB 670, 674-676 (2006). This remedial measure is intended to prevent Respondent Voith from taking advantage of their wrongdoing to the detriment of the employees and to restore the status quo ante thereby allowing the bargaining process to proceed. *U.S. Marine Corp.*, 944 F.2d 1305, 1322-1323 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992). Employees shall be made whole in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizon*, supra.

Respondent Voith shall make whole the unit employees by paying any and all delinquent employee benefit fund contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, Respondent Voith shall reimburse unit employees for any expenses ensuing from the failure to make required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

The AGC requests that Respondent Voith's employees (not the discriminatees) be compensated for any loss of wages or benefits stemming from Respondent's unilateral change to terms and conditions of employment. I agree that this relief is appropriate. See *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 83 (1979) (ordering a like remedy). Likewise, while not former Auto Handling employees, numerous Teamster affiliated employees' submitted applications to Voith but were not hired or considered for hire. Based on record testimony that approximately 300 permanent and temporary vehicle processing positions were available during the April 2012 startup period and subsequent months, a sizable pool of discriminatees existed that should have been considered for those positions.

The AGC also requests that a responsible management official in a meeting or meetings be ordered to read aloud the notice to employees in this case, and permit a representative of Teamsters Local 89 to be present. I agree that Respondent Voith should be required to do so. As the Board has explained, the purpose of requiring a manager to read a notice aloud to employees is to better impress upon the employees the fact that the employer and its officials are bound by the Act. *Marquez Bros. Enterprises, Inc.*, 358 NLRB 509 (2012) (citing *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), enfd. 400 F.3d 920 (D.C. Cir. 2005)). The Board explained that it will require a notice to be read aloud "where an employer's misconduct has been 'sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion.'" *Jason Lopez' Planet Earth Landscape, Inc.*, 358 NLRB 383 (2012) (quoting *HTH Corp.*, 356 NLRB 1397 (2011)). In this case, the unfair labor practices occurred on a large scale. There were numerous discriminatees and the unfair labor practices were very serious. After executing the contracts with Ford on February 13 and March 1, 2012, Respondent Voith, driven by antiunion animus, discriminated against members of the bargaining unit in assembling its work force. This is tantamount to an effort to wholly dislodge the Teamsters from its statutory role as bargaining representative of the employees. As a deliberate attempt to deprive the Union of its role as bargaining partner, it strikes at the heart of the national policy embodied in the Act, viz., "encouraging the practice and procedure of collective bargaining."

The AGC requests that, as part of the make-whole remedy, Respondent should be ordered to reimburse the difference in taxes owed upon receipt of a lump-sum payment and to submit documentation to the Social Security Administration so that back pay would be allocated to appropriate periods. Since the Board is presently considering this issue, I will not make a

ruling regarding this request. *Latino Express, Inc.*, 358 NLRB No. 823 (2012).

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if Respondent Voith or Respondent UAW customarily communicates with its employees or its members by such means. *J. Picini Flooring*, 356 NLRB 11 (2010). The posting of the paper notice by Respondent Voith and Respondent UAW shall occur at all places where notices to employees and members are customarily posted.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁷

ORDER

Respondent Voith, Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that if they were hired the employees would have to become members of the UAW.

(b) Rendering assistance, support, and recognizing the UAW at a time that the UAW did not represent an uncoerced majority of the unit or at a time that it did not employ in the unit a representative segment of its ultimate employee complement.

(c) Refusing to hire the former employees of the predecessor Auto Handling, Inc. because they engaged in concerted activities or to avoid an obligation to recognize and bargain with the Teamsters.

(d) Refusing to recognize and bargain in good faith with the Teamsters as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All employees as set forth in Article 3 of the National Master Automobile Transporters Agreement, Central and Southern Area Supplemental Agreements and the Job Descriptions provisions of the Local Rider.

(e) Unilaterally setting initial terms and conditions of employment for employees in the unit without first giving notice to and bargaining with the Teamsters about these changes.

(f) Granting the UAW access to its employees while denying access to the Teamsters.

(g) Informing its employees as a condition of being hired they would have to promise to refrain from engaging in Section 7 protected activity.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Teamsters in writing that it recognizes them as the exclusive representative of its unit employees under Section 9(a) of the Act and that it will bargain with it concerning terms and conditions of employment for employees in the unit.

²⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Recognize and, on request, bargain with the Teamsters as the exclusive representative of the employees in the unit concerning terms and conditions of employment and if an understanding is reached, embody the understanding in a signed agreement.

(c) At the request of the Teamsters, rescind any departures from terms and conditions of employment that existed immediately prior to Respondent Voith's takeover of predecessor Auto Handling's operation, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, until it negotiates in good faith with the Teamsters to agreement or to impasse.

(d) Make whole, in the manner set forth in the remedy section of this decision, the unit employees for losses caused by Respondent Voith's failure to apply the terms and conditions of employment that existed immediately prior to its takeover of predecessor Auto Handling's operation, subject to Respondent Voith's demonstrating in a compliance hearing that, had it lawfully bargained with the Teamsters, it would have, at some identifiable time, lawfully imposed less favorable terms than those that had existed under its predecessor.

(e) Withdraw and withhold all recognition from the UAW and its Local 862 as the exclusive collective-bargaining representative of its employees unless and until the UAW has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of our employees.

(f) Within 14 days from the date of this Order, offer employment to the following named former unit employees of the predecessor as set forth in attachment A, and other similarly situated employees, who would have been employed by Respondent Voith but for the unlawful discrimination against them, in their former positions or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any full-time or temporary employees hired in their place.

(g) Make the employees set forth in attachment A, and other similarly situated employees whole for any loss of earnings and other benefits they may have suffered by reason of Respondent Voith's unlawful refusal to hire them, in the manner set forth in the remedy section of this decision.

(h) Within 14 days from the date of this decision, remove from its files any reference to the unlawful refusal to hire the employees set forth in attachment A, and within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(i) Rescind its contract with Aerotek to perform work which otherwise would have been performed by the former employees of Auto Handling, and offer any jobs created by this rescission to the employees set forth in attachment A or to other similarly situated employees.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records, including an electronic copy of such records if stored

VOITH INDUSTRIAL SERVICES, INC.

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in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix A."²⁸ Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by Respondent Voith's authorized representative, shall be posted by Respondent Voith immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Voith to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent Voith has gone out of business or closed the facility involved in these proceedings, Respondent Voith shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent Voith at any time since January 31, 2012.

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent Voith has taken to comply.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁹

ORDER

Respondent United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO and Local 862, its officers, agents, and representatives shall

1. Cease and desist from

(a) Accepting assistance and support from Respondent Voith in order to meet with employees in order to urge them to sign membership applications and checkoff authorizations.

(b) Obtaining recognition from Respondent Voith at a time that we did not represent an uncoerced majority in the unit and when Respondent Voith had not started normal business operations nor employed in the unit a representative segment of its ultimate employee complement.

(c) Accepting recognition from Respondent Voith unless we are certified by the National Labor Relations Board as the exclusive collective-bargaining representative of its employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post copies at its union office copies of the attached notice marked "Appendix B."³⁰ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the UAW's authorized representative, shall be posted by the UAW immediately

upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the UAW to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the UAW has gone out of business or closed its office involved in these proceedings, the UAW shall duplicate and mail, at its own expense, a copy of the notice to all current members and employees and former employees employed by Auto Handling, Inc. at any time since February 20, 2012.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the UAW has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 21, 2012

ATTACHMENT A

Babbage, Terron Miguel	McCrory, Timothy Kyle
Bassett, Angela Elizabeth	McGee, Vivian J.
Bernard, Jason Neal	Miller, Ralph C.
Blandford, Shawn K.	Moon, Roy L.
Bowman-Miles, Patsy	Morris, Tanitra Tonett
Bridges, Roy A.	Murphy, Michael Ronald
Bridges, Paul M.	Murphy, Patti Jo
Brooks, Lonnie Paul	Murphy, Tammy Jo
Burden, Michael	Norbury, Jason J.
Burkhart, Maranda Jane	Page Jr., Marvin E.
Burton, Mark Anthony	Pinkard, Cassandra
Burton, Richard D.	Poland, Dathan L.
Byers, Tiffany L.	Pope, Marcus D.
Byers, Jason P.	Proctor, John A.
Cheatham, Deborah Susan	Ragland, Rickey
Clark, Jewell Loury	Rankin, Michael Lynn
Davis, Johnny Edward	Rasool, Rasheed M.
Doss, Helen K.	Rhodes, James Leroy
Downs, June Gail	Rhodes, Sandra Darlene
Downs, William C.	Rhodes, Tonya Lynett
Dudeck Jr., Joseph Charles	Ruzanka, Robert John
Faulkner, Adam Troy	Sawyer, Eric L.
Fenwick, Virginia Sue	Schofield, Kathy Jane
Fields, Bronston Shane	Schott, Aaron M.
Filburn, Adam Troy	Scott, Gary M.
Flanagan, James Christopher	Scott, Donna Sue
Flemming, Louis E.	Shaw, Donald L.
Fluhr, Russell Glenn	Shelburne, Angela R.
Gilkey, Richard Edward	Smallwood, James Timothy
Girdley, James Wayne	Smith, Christopher S.
Goldsmith, Anthony Scott	Stein, Kelly
Goodrich, Damon A.	Stephenson, Alicesha
Grether, Wayne Henry	Sullivan, Michael J.
Helm, Walter L.	Swift, Brenda Fay
Helm, Brenda L.	Tweedy, Bernard
Helm, Marcus D.	Waddle, Jamie Glenn
Johnson, Greg C.	Walker, Mickey David

²⁸ If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

²⁹ See fn. 27, supra.

³⁰ See fn. 28, supra.

Kelley, Theoras Andre
Kelley, Bronda
Lewter, Kimberly Dawn
Lockard, Tammy Lou
Lowery, Jemaine D.
McCray, Michael A.

Whitley, Kelly Denise
Wieseman, Emily K.
Willis, Kenneth B.
Womack, Tyrone M.
Wordlow, Darrick

APPENDIX A

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell you that your employment is dependent on becoming a member of the UAW or its Local Union No. 862.

WE WILL NOT assist the UAW by allowing them to use our facilities to solicit our employees to become members of the UAW while our employees are on worktime.

WE WILL NOT, tell you, or instruct our hiring contractor, Aerotek, Inc., or any other hiring contractor, to tell you that you cannot work for us unless you waive your right to engage in lawful picketing or other Section 7 activity.

WE WILL NOT refuse to hire or otherwise discriminate against applicants, including former employees of the predecessor employer, Auto Handling, Inc., a wholly owned subsidiary of Jack Cooper Transport Company, to avoid bargaining with Teamsters Local 89.

WE WILL NOT assist, recognize and bargain with UAW as the collective-bargaining representative of our employees who are employed by us at the Ford Motor Company Louisville Kentucky Assembly plant, performing vehicle processing including staging, shuttle and yard/inventory work, unless and until the UAW has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of these employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL, withdraw and withhold all recognition from the UAW as the collective-bargaining representative for our employees at the Ford Motor Company Louisville Kentucky Assembly plant, performing vehicle processing including staging, shuttle, and yard/inventory work, unless and until the UAW has been certified by the National Labor Relations Board as the

exclusive collective-bargaining representative for these employees.

WE WILL notify the Teamsters in writing, that we recognize it as the exclusive collective-bargaining representative of our employees.

WE WILL, upon request, recognize and bargain with the Teamsters as the exclusive representative of our employees employed by us at the Ford Motor Company Louisville Kentucky Assembly plant, performing vehicle processing including vehicle staging, shuttle, and yard/inventory work, concerning their terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, at the request of the Teamsters, rescind any departures from the terms and conditions of employment that existed immediately prior to our award of the predecessor Auto Handling, Inc. vehicle processing operations, retroactively restore preexisting terms and conditions of employment, including, but not limited to wage rates and benefit plans, until we negotiate in good faith with the Teamsters to agreement or to impasse.

WE WILL offer, in writing, immediate and full employment to the employees of the predecessor Auto Handling, Inc., named on attachment A, in the order of our receipt of their employment applications, without prejudice to their seniority and other rights and privileges, discharging if necessary employees previously hired to make room for them, and make them whole for any loss of earnings they may have suffered by reason of our unlawful failure to hire them.

WE WILL offer, in writing, immediate and full employment to the other applicants whose applications were submitted to us by the Teamsters for vehicle processing work in the order of our receipt of their employment applications, without prejudice to their seniority and other rights and privileges, discharging if necessary employees previously hired to make room for them, and make them whole for any loss of earnings they may have suffered by reason of our unlawful failure to hire them.

WE WILL rescind our contract with Aerotek, Inc. to hire employees at the Louisville Kentucky Assembly plant.

VOITH INDUSTRIAL SERVICES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-075496 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



VOITH INDUSTRIAL SERVICES, INC.

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APPENDIX B

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT accept assistance and support from Voith Industrial Services, Inc. in order to meet with employees in order to urge them to sign membership applications and checkoff authorizations.

WE WILL NOT obtain recognition from Voith Industrial Services at a time that we did not represent an uncoerced majority in the unit and when Voith Industrial Services, Inc. had not started normal business operations nor employed in the unit a representative segment of its ultimate employee complement.

WE WILL NOT accept recognition from Voith Industrial Services, Inc. unless we are certified by the National Labor Relations Board as the exclusive collective-bargaining representative of its employees.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed you by Section 7 of the Act.

UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO AND LOCAL 862

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-075496 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

